85-1481

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE STATE OF IOWA *ex rel.*
THOMAS J. MILLER,
Attorney General of Iowa,

and

DANNY GETTLER, *et al.*,

Petitioners,

vs.

JOHN BLOCK, Secretary of the
United States Department of Agriculture,
and THE UNITED STATES
DEPARTMENT OF AGRICULTURE,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

G. F. HOFFMAN III
Hoffman Law Firm
107 West Ninth Street
Leon, Iowa 50144

Counsel for Petitioners
Danny Gettler, et al.

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Bldg.
Des Moines, Iowa 50319
(515) 281-5164

TIMOTHY D. BENTON
Assistant Attorney General

KEVIN M. KIRLIN
Assistant Attorney General

Counsel for Petitioner,
The State of Iowa

*Counsel of Record

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether an Administrative Procedure Act action challenging the validity of a rule which purports to terminate a statutory program established by the Congress is an attempt to obtain "an attachment, injunction, garnishment, or similar process, mesne or final" against the Commodity Credit Corporation or its property in violation of 15 U.S.C. § 714b(c).

2. Whether an Administrative Procedure Act action seeking to require the Secretary of Agriculture to comply with federal law and his own rules is an attempt to obtain "an attachment, injunction, garnishment, or similar process, mesne or final" against the Commodity Credit Corporation or its property in violation of 15 U.S.C. § 714b(c).

3. Whether a state may litigate on its own behalf or as parens patriae to force a federal agency to comply with the intent of statutory provisions enacted by Congress that are beneficial to the citizens of the State.

4. Whether allegations of injury to the state fisc establish sufficient injury in fact to confer standing to challenge the failure of a federal agency to provide statutory benefits to its citizens.

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JOINT PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioners, the State of Iowa ex rel. Thomas J. Miller and Danny Gettler, et al., respectfully pray that a Writ of Certiorari issue to review the judgment

and opinion of the United States Court of Appeals issued on September 21, 1985, rehearing and rehearing en banc denied on December 5, 1985.

OPINION BELOW

The opinion of the Court of Appeals is reported at 771 F.2d 347 and is presented in Petition Appendix A for the convenience of the Court. The order denying rehearing en banc, which is not reported, appears as Petition Appendix B. The unreported opinion of the District Court appears as Petition Appendix C.

JURISDICTION

The final judgment of the Court of Appeals for the Eighth Circuit was entered on December 5, 1985, after rehearing and rehearing en banc was denied. This petition is filed within

ninety days of entry of judgment. Jurisdiction is invcked pursuant to 28 U.S.C. § 1243(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2, cl. 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

STATUTES

Administrative Procedure Act

5 U.S.C. § 706(2)(a):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

> . . .
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> ....

5 U.S.C. § 701(a)(2):

(a) This chapter applies, according to the provisions thereof, except to the extent that--
...

(2) agency action is committed to agency discretion by law.

Emergency Feed Program

7 U.S.C. § 2267(a):

Notwithstanding any other provision of law, the Secretary of Agriculture may implement an emergency feed program for assistance in the preservation and maintenance of livestock and poultry in any area of the United States, including Puerto Rico, Guam, and the Virgin Islands of the United States, where, because of flood, drought, fire, hurricane, earthquake, storm, or other natural disaster, the Secretary determines that an emergency exists.

Livestock Feed Program

7 U.S.C. § 1427:

The Commodity Credit Corporation may sell any farm commodity owned or controlled by it at any price not prohibited by this section. . . . The Corporation shall not sell any basic agricultural commodity or storable nonbasic commodity at less than 5 per centum above the current support price for such

commodity, plus reasonable carrying charges:

* * *

Notwithstanding the foregoing, the Corporation, on such terms and conditions as the Secretary may deem in the public interest, may make available any farm commodity or product thereof owned or controlled by it for use in relieving distress . . . in connection with any major disaster determined by the President to warrant assistance by the Federal Government under sections 1855 to 1855g of Title 42 and may make feed owned or controlled by it available at any price not less than 75 per centum of the current basic county loan rate (or a comparable price if there is no current basic county loan rate) for assistance in the preservation and maintenance of foundation herds of cattle (including producing dairy cattle), sheep, and goats, and their offspring, in any area of the United States including the Virgin Islands where, because of flood, drought, fire, hurricane, earthquake, storm, disease, insect infestation, or other catastrophe in such areas, the Secretary determines that an emergency exists which warrants such

assistance, such feed to be made available only to persons who do not have, and are unable to obtain through normal channels of trade without undue financial hardship, sufficient feed for such livestock: Provided, That the Secretary may provide for the furnishing of feed or mixed feed, in accordance with regulations prescribed by him, to such persons by feed dealers under an arrangement whereby the feed grains (or other feed being sold by the Corporation) in the feed so furnished would be replaced with feed owned or controlled by the Corporation and sold to such persons at a price determined as provided above (emphasis supplied).

* * *

Anti-Injunction Provision

15 U.S.C. § 714b(c):

The Corporation --

(c) May sue and be sued, but no attachment, injunction, or other process, mesne or final, shall be issued against the Corporation or its property.

REGULATIONS

Livestock Feed Program

7 C.F.R. § 1475.1:

The regulations in this subpart contain the terms and conditions of a Livestock Feed Program. . . .

Emergency Feed Program

7 C.F.R. § 1475.50:

The regulations in this subpart contain the terms and conditions of an emergency feed program. . . .

7 C.F.R. § 1475.53:

Benefits under the program shall be available to any owner of livestock which are maintained in the United States . . . who: (a) has suffered during the crop year a substantial loss of livestock feed normally produced on land owned (or operated under a bona fide lease) by the livestock owner, and (b) has filed an application for assistance under the Emergency Feed Program no later than April 8, 1982. . . .

STATEMENT OF THE CASE

The State of Iowa and several individual farmers seek review of the adverse portions of a decision of the United States Court of Appeals for the Eighth Circuit which held that 15 U.S.C. § 714b(c) immunized the Secretary of Agriculture and the United States Department of Agriculture from an Administrative Procedure Act (APA) challenge tc an agency rule and barred judicial review to compel the Secretary to comply with federal law and his own duly promulgated rules. The Court of Appeals also erroneously ruled that the State of Iowa lacked standing to seek judicial review of the agency's action.

A. Factual Background.

In 1983 livestock farmers in Iowa experienced the worst drought since the dust bowl. Transcript of Hearing on

Preliminary Injunction at 22-24 (hereinafter Tr.). Yields on feed grains used by livestock farmers to support their herds fell to a small fraction of established yields in normal years. Tr. 62, 126. The inability of livestock farmers to produce their own feed grains forced producers either to purchase feed grains or feed grain substitutes on the open market or to liquidate all or part of their herds. Tr. 207. Either course of action presented livestock producers with dramatic financial hardship. As a result of the drought and its consequences, "many farmers skirted the brink of financial ruin." State of Iowa ex rel. Miller v. Block, 771 F.2d 347, 348; Pet. App. 3.

B. The Congressionally Established Disaster Assistance Programs.

Congress has long recognized that farmers are at the mercy of weather conditions. In order to assist farmers facing severe economic hardship caused by unpredictable weather catastrophies such as the 1983 drought, Congress established in 1949 a Livestock Feed Program currently codified in 7 U.S.C. § 1427.

In the Food and Agriculture Act of 1977, Congress established an Emergency Feed Program, now codified at 7 U.S.C. § 2267, to provide an additional safety net for livestock producers.

Under the Emergency Feed Program, or EFP, the Secretary is authorized to provide cash assistance to livestock producers in order to preserve herds when natural disasters such as drought have created an emergency. Based on the

congressional authorization, the Secretary has promulgated extensive rules establishing the EFP, 7 C.F.R. §§ 1475.50-.68. The rules establish eligibility criteria, § 1475.54, describe procedures for applying, § 1475.55, and structure program benefits, § 1475.56. In 1982 the Secretary promulgated a rule which expressly terminated EFP benefits for any and all applications received after April 8, 1982. 7 C.F.R. § 1475.53.

The Livestock Feed Program, or LFP, authorizes the Secretary to make available federally held commodities to affected farmers at advantageous prices. As with the EFP, the Secretary has promulgated extensive rules establishing the program, 7 C.F.R. §§ 1475.1-.17. Unlike the EFP, the Secretary has not attempted to terminate the program through rulemaking.

C. Proceedings Below.

Notwithstanding the severity of the 1983 drought the Secretary refused to provide program benefits to Iowa livestock farmers under the EFP or LFP. After informal efforts by the Governor and members of Iowa's congressional delegation to persuade the Secretary to provide benefits under the programs, the State of Iowa, as parens patriae of its citizens, filed an action under the Administrative Procedure Act in the United States District Court for the Southern District of Iowa which, inter alia, challenged the Secretary's failure to provide benefits to qualified farmers under the EFP and the LFP. The State challenged the validity of the EFP rule purporting to terminate the program with respect to applications received after April 8, 1982, as arbitrary and

capricious and contrary to the will of Congress, 7 C.F.R. § 1475.53. The State also challenged the failure of the Secretary to provide benefits under the rules establishing the LFP. After the State filed its parens patriae action, several individual farmers and their spouses sought and were granted intervention as additional plaintiffs.

After an evidentiary hearing on the plaintiffs' motion for a preliminary injunction, the District Court dismissed the action. Pet. App. 55-77. The Court first found that the State had no standing to litigate, either on its own behalf or as parens patriae for its citizens. Pet. App. 62, 68. The Court further concluded that it had no subject matter jurisdiction to review the Secretary's decisions not to implement the programs. Pet. App. 75. The Court

believed the broad delegation of authority left it with no "law to apply" in reviewing the Secretary's inaction. Pet. App. 71-72. While the Court recognized that the challenge to the Secretary's termination regulation presented "the judicial review issue in a distinct procedural context" [Order at 12 n.5. Pet. App. 77 n.5], it refused to consider the plaintiffs' APA attack on the rule. The Court did note, however, that were it to review the Secretary's decision not to provide assistance under the programs, "it would have no difficulty in finding that the emergency assistance programs actually implemented by the Secretary did not provide sufficient relief to livestock farmers in southeast Iowa who find themselves in precarious financial positions due, at least in part, to the

adverse weather conditions of the past three years." Order at 10. Pet. App. 74.

The State and plaintiff-intervenors filed a motion for altered judgment after the District Court entered its order dismissing the case. In their motion, the State and plaintiff-intervenors re-emphasized that with respect to the EFP, the action presented a straightforward APA challenge to the validity of a rule which purported to "terminate" the program. The State and plaintiff-intervenors further reiterated their view that with respect to the LFP, the Secretary had implemented the program through rulemaking. Once rules are promulgated establishing a program, the State and plaintiff-intervenors argued, the Secretary was legally required to follow them until he had

them amended or withdrawn through APA rulemaking procedures. The District Court denied the motion for altered judgment and the plaintiffs appealed.

On appeal, the Court of Appeals affirmed the District Court ruling that the State of Iowa lacked standing to litigate. State of Iowa ex rel. Miller v. Block, 771 F.2d 347, 352-55; Pet. App. 1-52. The Court further affirmed the District Court's dismissal of the action challenging the failure of the Secretary to provide qualified farmers with assistance under the EFP and LFP. In reaching this result, however, the Court of Appeals did not rely on the "no law to apply" exception to judicial review under the APA.[1] Instead, the

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[1] It should be noted that the Court found that the plaintiffs' challenge to the Secretary's failure to

Court of Appeals found the action concerning the EFP and LFP barred by the anti-injunction provisions of 15 U.S.C. § 714b(c). This provision states that the Commodity Credit Corporation "may sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the corporation or its property." According to the Court of Appeals, because EFP and LFP benefits are "administered under the auspices of the CCC," the District Court lacked jurisdiction to consider the APA attack against the validity of the Secretary's

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n.1 continued

implement the Special Disaster Payments Program at 7 U.S.C. § 1444d(b)(2)(D) presented a straightforward case compelling judicial review of agency inaction. State of Iowa ex rel. Miller v. Block, 771 F.2d at 351; Pet. App. 14-15.

EFP termination rule and the APA attack on the Secretary for failing to abide by his own rules establishing the LFP program. See State ex rel. Miller v. Block, 771 F.2d at 348 n.1. Pet. App. 46-48 n.1.

E. Issues Presented To This Court.

While the proceedings below are complex, the issues presented to this Court in this petition are well focused. The first issue is whether district court jurisdiction to consider an APA action challenging the rule promulgated by the Secretary of Agriculture attempting to terminate the EFP program was ousted by the CCC anti-injunction provisions in 15 U.S.C. § 714b(c). The second issue is whether an APA action to force the Secretary to abide by his own rules is barred by the same anti-injunction provision. The final

question is whether a state has standing as parens patriae or on its own behalf to enforce the terms of congressionally established programs that benefit its citizens.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE REFUSAL OF THE SECRETARY TO PROVIDE DISASTER ASSISTANCE TO LIVESTOCK FARMERS WHOSE OPERATIONS WERE DEVASTATED BY THE 1983 DROUGHT HAS HAD MAJOR IMPACT ON THE LIVESTOCK INDUSTRY IN THE MIDWEST.

The refusal of the Secretary to provide relief under the two programs at issue in this petition has had a major impact on livestock farming in the Midwest. The impact of the drought is illustrated by the evidence presented to the district court hearing on the plaintiffs' motion for a preliminary injunction.

The testimony of individual farmers was especially powerful. Hope Mendenhall of Garden Grove, Iowa, testified that corn yield on her family's farm in 1983 averaged seven bushels per acre in contrast to 125 bushels per acre in a normal year. Tr. 62. In addition to affecting corn yields, the drought also had a "devastating" effect on hay and pasture on the farm, a potential alternative source of livestock nutrition. Tr. 64. Without any meaningful assistance from disaster programs, the Mendenhalls were forced to prematurely reduce their cattle herd. Tr. 81. They were forced to purchase an additional $100,000 of feed to replace the feed grain that they normally would have produced on their own farm were it not for the drought. Tr. 85.

Similar testimony was offered by Henry Richardson of Lineville, Iowa.

Richardson told the District Court that because of the reduced yields on his farm (less than 5 bushels per acre) and the damage to pasture land caused by the drought, he suffered dairy production losses and experienced an increased incidence of disease in his dairy herd. Tr. 126. As a result of the drought, Richardson testified that he had insufficient feed to sustain his dairy cows and sheep. Consequently, he was forced to sell his starving young calves and lambs at disadvantageous prices. Tr. 134-136.

While both the Mendenhall and Richardson operations are financially stressed, testimony at the District Court hearing indicated that there was still hope for their economic survival. Agricultural banker Leslie Miller, after reviewing the financial posture of the

Mendenhall and Richardson operations, testified that it was possible for them to remain in farming with timely assistance. Tr. 208-209. She noted that federal agricultural loans are inadequate and that "cash injections" such as that available to eligible farmers under the EFP are essential to their survival. Tr. 226.

Miller further testified that it would take almost five years for cow-calf operations in southern Iowa to show any significant profits after the 1983 drought. Tr. 186. Agricultural economist Daniel Otto buttressed Miller's testimony, observing that an increasing volume of farm bankruptcies after the conclusion of the 1984 crop year could be expected as the effects of the drought rippled through successive years of livestock operations. Tr. 234.

The import of the evidence is clear: timely assistance under the programs which the Secretary has refused to implement would provide many livestock farmers with the resources necessary to stay on the farm. Conversely, failure to render timely assistance will speed up the process of foreclosure and bankruptcy of farmers unable to recover from the 1983 disaster.

This case is thus not simply important to the particular parties before the Court, Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923), but to a substantial portion of the public. Because of the importance of the issues raised to the livestock industry in the Midwest, this Court should grant the petition for certiorari.

II. THE COURT OF APPEALS' OPINION INSULATES IMPORTANT RULEMAKING AND AGENCY ACTION FROM JUDICIAL REVIEW CONTRARY TO ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW.

The thrust of the Court of Appeals' opinion is that because a United States Department of Agriculture program is administered by the Commodity Credit Corporation, no attack under the Administrative Procedure Act may be launched to challenge program rules promulgated by the Secretary or to force the Secretary to comply with rules already in place. This approach runs afoul of the established principles of administrative law articulated by this Court in Barlow v. Collins, 397 U.S. 159, 167 (1970) (validity of amended regulation not a question committed to agency discretion by law); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)

(strong presumption of judicial review of agency action); and Motor Vehicle Mfr. Ass'n. of the United States v. State Farm Mutual Ins. Co., 463 U.S. 29, 41-42 (1983) (agency action reversing previous policy subject to heightened judicial review).

The refusal of the Court of Appeals to allow plaintiffs to challenge the rule purporting to terminate the EFP program was particularly unsupportable. The agency's own rule, 7 C.F.R. § 1475.53, states:

> Benefits under the program shall be available to any owner of livestock which are maintained in the United States . . . who: (a) has suffered during the crop year a substantial loss of livestock feed normally produced on land owned (or operated under a bona fide lease) by the livestock owner, and (b) has filed an application for assistance under the Emergency Feed Program no later than April 8, 1982. . . .

(emphasis supplied).

The effect of this rule, which arbitrarily imposed an April 8, 1982, cutoff for applications for EFP benefits, was to terminate the program altogether. As announced by the Secretary in the notice accompanying the rule in the Federal Register, "the effect of this interim rule is to terminate this discretionary program in order to reduce administrative costs (emphasis supplied)." 47 Fed. Reg. 9,981 (March 9, 1982).

The plaintiffs maintained that the purported termination rule was contrary to the intent of Congress in that when it enacted 7 U.S.C. 2267, the Congress expected the Secretary to use his discretion to create some kind of EFP program, not abolish it altogether by administrative fiat. In addition, the plaintiffs sought to attack the

termination rule through an Overton Park-type analysis, claiming that the Secretary failed to consider important relevant factors when it promulgated the rule. The Court of Appeals fundamentally erred when it tossed aside these challenges to the Secretary's action simply because the programs are carried out through the Commodity Credit Corporation.

The only other case considering the question of whether the anti-injunction provisions of 15 U.S.C. § 714b(c) apply to the Secretary's rulemaking proceedings comes to a result consistent with Barlow and dramatically opposed to the Court of Appeals in this case. In Mitchell v. Block, 551 F.Supp. 1011 (W.D.Va. 1982), the Court considered whether the anti-injunction provision prevented an action seeking to enjoin

the Secretary from refusing to grade and provide price support for barley tobacco. The defendants asserted that because price support is offered through the Commodity Credit Corporation, the action was barred by 15 U.S.C. § 714b(c).

The District Court rejected the claim, noting the action was against the Secretary of Agriculture. The court noted that there is no language in 15 U.S.C. § 714b(c) "which would estop this Court from enjoining the Secretary from doing an arbitrary and capricious act." Mitchell v. Block, 551 F.Supp. at 1015. The mere fact that the farmers would be entitled to assistance under the EFP and LFP if the Secretary were restrained from unlawful acts does not clothe the Secretary with the corporation's cloak

of immunity. Mitchell v. Block, 551 F.Supp. at 1016.

The approach in Mitchell is sound. If the law were as the Court of Appeals held in the instant case, district courts would be deprived of jurisdiction to consider APA challenges to a host of agriculture programs established by the Secretary of Agriculture but administered or carried out through the Commodity Credit Corporation. 7 U.S.C. § 1444(g)(15) (loan rates, target prices, disaster payments, acreage reduction, and land diversion programs for cotton); 7 U.S.C. § 1444d(h) (loan rates and target prices for feed grains); 7 U.S.C. § 1445b-1(h) (loan and target price program for wheat); 7 U.S.C. § 1445b-2(e) (deficiency payments program for wheat, feed grains, upland cotton, and rice producers). Because the approach of the Court of Appeals is

so fundamentally wrong and sweeping in its potential application, this Court should grant this petition for writ of certiorari.

III. THE QUESTION OF WHETHER A STATE HAS STANDING TO ENFORCE CONGRESSIONALLY ESTABLISHED POLICY IS AN IMPORTANT QUESTION THAT HAS DIVIDED THE COURTS OF APPEAL.

The State of Iowa alleged that the well-being of all Iowa citizens is dependent upon the economic viability of its farmers and livestock producers. Complaint, ¶ 15. The State of Iowa further alleged that the failure of the Secretary to assist livestock farmers would impose fiscal burdens on the State because it administers unemployment compensation and other programs for displaced workers and failed businesses affected by the drought. Amended Complaint, ¶ 17.

The Court of Appeals dismissed the State as a party, deciding first that the State had failed to establish sufficient injury in fact to meet the requirements of Article III of the United States Constitution. See State of Iowa ex rel. Miller v. Block, 771 F.2d at 354; Pet. App. 26-27. The Court of Appeals further held that the State lacked standing to litigate as parens patriae on behalf of its citizens. Block, 771 F.2d 354-355; Pet. App. 29-30.

The State believes the Court of Appeals erred in giving short shrift to its allegations of fiscal harm. As a provider of a wide array of public services, the State has a vital interest in maintaining revenues and controlling expenditures. Several lower courts have recognized that similar fiscal interests are sufficient to meet Article III

standing requirements. Carey v. Klutznick, 637 F.2d 834, 838 (2nd Cir. 1980); Alabama ex rel. Baxley v. Tennessee Valley Authority, 467 F.Supp 791, 794-5 (N.D. Ala. 1979), rev'd on other grounds sub. nom. Alabama ex rel. Graddick v. Tennessee Valley Authority, 636 F.2d 1061 (5th Cir.), cert. denied, 454 U.S. 837 (1981); City of New York v. Heckler, 578 F.Supp. 1109, 1119-22 (E.D.N.Y.), aff'd on other grounds, 742 F.2d 729 (2d Cir. 1984), partial stay granted pending disposition, ___ U.S. ___, 105 S.Ct. 3552, cert. granted, ___ U.S. ___, 106 S.Ct. 57 (1985).

In addition, the question of whether a state may assert parens patrae standing to seek judicial review of federal agency action presents a question that has divided the Courts of Appeal. In this case, the Court of

Appeals for the Eighth Circuit rejected parens patriae standing, citing dicta in a footnote in Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 610 n.16 (1982), and Commonwealth of Pennsylvania v. Kleppe, 533 F.2d 668, 677-78 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976).

The Court of Appeals failed to recognize the posture of this case. The State of Iowa does not seek to enjoin or cut down a federal statute on constitutional grounds as was the case in Massachusetts v. Mellon, 262 U.S. 447 (1923). Instead, the State is seeking to vindicate the congressional will by preventing the Secretary from engaging in actions contrary to federal law. The parens patriae doctrine is being used as a sword to insure that an executive official complies with federal policy, not as a shield to protect a state from

the political output of the federal system.

This critical distinction has been recognized by this Court. See Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 446-47 (1945) (state seeking to enforce federal law distinguished from Mellon). In conflict with the approach of the Court of Appeals in this case, the Second, Fifth, and Ninth Circuits have held that the Mellon doctrine does not preclude suits by state authorities seeking to compel compliance with applicable federal law. See Carey v. Klutznick, 637 F.2d at 838 (census "undercount" of New York residence); Washington Utilities and Transportation Commission v. Federal Communications Commission, 513 F.2d 1142, 1153 (9th Cir.), cert. denied, 423 U.S. 836 (1975) (state agency has parens patriae

standing to challenge FCC order); Florida v. Weinberger, 492 F.2d 488, 493-494 (5th Cir. 1974) (reversing dismissal of state challenge to federal regulation).

Nothing in Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592 (1982) defeats state parens patriae standing in this case. The only reference in Snapp to an action brought by a state against the federal government amounted to pure dicta in a footnote. In fact, Snapp upheld the territory's assertion of parens patriae standing in that suit against private defendants. The brief footnote distinguishing parens patriae suits against the federal government is clearly dicta. Further, it does not reflect the critical distinction between actions challenging congressional acts and those challenging an agency's

failure to implement the will of Congress. The rule of Massachusetts v. Mellon, 262 U.S. 447 (1923), should not apply where, as here, a state challenges a federal agency's refusal to comply with federal law. This question was not at issue in Snapp, and the Eighth Circuit erred in relying on a footnote to dispose of the state's action.

CONCLUSION

For all the above reasons, the State of Iowa and individual farmers respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Bldg.
Des Moines, Iowa 50319
(515) 281-5164

TIMOTHY D. BENTON
Assistant Attorney General

KEVIN M. KIRLIN
Assistant Attorney General

G. F. HOFFMAN III
Hoffman Law Firm
107 West Ninth Street
Leon, Iowa 50144

ATTORNEYS FOR PETITIONERS

*Counsel of Record

85-1481

Supreme Court, U.S.
FILED
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CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF IOWA *ex rel.*
THOMAS J. MILLER,
Attorney General of Iowa,

and

DANNY GETTLER, *et al.*,

Petitioners,

vs.

JOHN BLOCK, Secretary of the
United States Department of Agriculture,
and THE UNITED STATES
DEPARTMENT OF AGRICULTURE,

Respondents.

APPENDIX TO JOINT PETITION FOR CERTIORARI

G. F. HOFFMAN III
Hoffman Law Firm
107 West Ninth Street
Leon, Iowa 50144

Counsel for Petitioners
Danny Gettler, et al.

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Bldg.
Des Moines, Iowa 50319
(515) 281-5164

TIMOTHY D. BENTON
Assistant Attorney General

KEVIN M. KIRLIN
Assistant Attorney General

Counsel for Petitioner,
The State of Iowa

*Counsel of Record

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APPENDIX A

The STATE OF IOWA ex rel. Thomas J. MILLER, Attorney General of Iowa, Danny and Carene Gettler, H.S. and Maxine Lovett, Robert S. and Hope Mendenhall and Tom and Linda Watkins, Appellants,

v.

John R. BLOCK, Secretary of the United States Department of Agriculture; the United States Department of Agriculture, an agency of the United States Government, Appellees.

No. 84-2278.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 14, 1984.

Decided Aug. 15, 1985, rehearing and rehearing en banc denied Dec. 5, 1985.

Before LAY, Chief Judge, and HEANEY and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

The State of Iowa (State) and several individual farmers (plaintiffs-intervenors in the district court)

appeal from the district court's dismissal of their motion for a preliminary injunction to compel John Block, Secretary of the United States Department of Agriculture (Secretary), to implement three federal agricultural disaster relief programs. For reversal, the State and the farmers argue that the district court erred, first, in declining to accept subject matter jurisdiction on the ground that the Secretary's decisions under the discretionary programs are not reviewable in the courts; second, in approving the Secretary's actions according to "pragmatic factors"; and, third, in finding that the State lacked standing to sue as parens patriae on behalf of its citizens. Although we affirm the district court's finding regarding the State's lack of standing, we believe the district court erred in declining to accept

subject matter jurisdiction of one of the programs. Accordingly, we reverse and remand for additional proceedings in accordance with this opinion.

I. BACKGROUND.

In 1983, a devastating drought parched the agricultural midwest, including southern Iowa. Farm output fell to a fraction of its ordinary level and many farmers skirted the brink of financial ruin. To mitigate this disaster, Iowa's governor requested that the Secretary implement several discretionary federal disaster relief programs, which the Secretary declined to do. For purposes of this appeal, these programs included the Special Disaster Payment Program (SDPP), 7 U.S.C. § 1444d(b)(2) (1982); the Livestock Feed Program (LFP), 7 U.S.C. § 1427 (1982) (as implemented in 7 C.F.R. §§ 1475.1-17

(1982); and the Emergency Feed Program (EFP), 7 U.S.C. § 2267 (1984) (as implemented in 7 C.F.R. §§ 1475.50-68 (1984).[1]

When the Secretary refused assistance under these programs, the State of Iowa filed an action in federal court seeking an injunction to compel him to implement the programs. After the action had commenced, six Iowa farm couples (who suffered under the drought and would be eligible for benefits under these programs) intervened as plaintiffs in the action. The district court heard argument on the motion for preliminary injunction and on the motion to dismiss and dismissed the action, finding that the State had no standing to litigate either on its own behalf or as parens patriae. The district court also found that it had no subject matter jurisdiction because the statute's broad grant

of authority left the courts little or no law on which to review the Secretary's inaction. Finally, the district court also cited pragmatic considerations--deference to agency expertise--which required dismissal. The State and the intervenors appeal.

II. SUBJECT MATTER JURISDICTION.

In determining that it lacked subject matter jurisdiction to consider the case at bar, the district court relied on a narrow exception to the grant of judicial review established in the Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2). In pertinent part, that section provides for judicial review of agency action "except to the extent that--* * * (2) agency action is committed to agency discretion by law." The Supreme Court has interpreted this section as applicable "in those rare

instances where statutes are drawn in such broad terms that in a given case there is no law to apply." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971), citing S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945). After reviewing the applicable legal standards and the relevant legislative and administrative materials, we conclude that the district court erred in declining to accept subject matter jurisdiction based on this provision.

Initially, we examine relevant case law to determine the sources from which we might derive "law to apply." In Overton Park, the Supreme Court held that the "agency discretion" exception to judicial review is "very narrow" and applies only in "rare instances." Id. In that case, the Supreme Court followed

a careful pattern as it reviewed the language of the statute in question and its legislative history. Elsewhere the Supreme Court has specified what materials constitute the proper subject of inquiry in this type of case: "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block v. Community Nutrition Institute, 467 U.S. 340, ___, 104 S.Ct. 2450, 2454, 81 L.Ed.2d 270, 275-76 (1984). Accordingly, we now turn to these legislative materials.

A. The SDPP Statute and Supporting Legislative Materials.

The Special Disaster Payments Program (SDPP), which is without imple-

menting regulations, presents sufficient legislative materials to assist reviewing courts. Under 7 U.S.C. § 1444d(b)(2), the Secretary "shall" make disaster payments to farmers on farms which are not covered by the Federal Crop Insurance Act (FCIA) (7 U.S.C. § 1501 et seq.) if the Secretary determines either that a natural disaster has prevented planting of feed grains or that a natural disaster has reduced the harvest of feed grains. 7 U.S.C. § 1444d(b)(2)(A) & (B). On farms that are covered by the FCIA, the Secretary "may make disaster payments" whenever he determines: 1) that, as a result of natural disaster, farmers have sustained "substantial losses of production"; 2) that other federal assistance programs are insufficient to alleviate the economic emergency; and 3) that

"additional assistance must be made available" to eliminate the economic emergency. 7 U.S.C. § 1444d(b)(2)(D)(iii).

The legislative history of the bill is also illuminating in that it addresses the interaction of SDPP with the Federal Crop Insurance Program. Although the statute "does not specify the emergency situations" in which assistance under SDPP would be provided, Senator Heflin provided "some idea of the situations in which the Secretary could reasonably be expected to implement the disaster payments program." The list of examples, which was "not meant to be inclusive," included situations in which:

> (1) the Federal crop insurance policy excludes coverage for the disaster risk that caused the loss; (2) there was a lack of understanding of the crop insurance program among

> producers affected by the disaster; (3) the crop insurance program was not adequately sold in the area affected by the disaster, or the Federal Crop Insurance Corporation's educational efforts were inadequate; or (4) the Federal Crop Insurance Corporation used an inaccurate actuarial basis so that a producer affected by the disaster was unable to obtain coverage adequate to protect his crop sufficiently.

S.Rep. No. 126, 97th Cong., 1st Sess. 78, reprinted in 1981 U.S.Code Cong. & Ad. News 1965, 2042-43.

The appellants also direct our attention to a General Accounting Office (GAO) Report on USDA disaster aid payments under the Agriculture and Food Act of 1981. That report noted that the Act vests substantial discretionary authority in the Secretary to make these aid payments, yet it concluded that "USDA's use of this discretion should be based on objective criteria. However,

USDA has not developed objective criteria to be used in awarding special disaster payments. This lack of criteria may result in subjective or inconsistent application of the Act." United States General Accounting Office, Report to the Honorable Berkley Bedell, USDA Needs Objective Criteria for Awarding Special Disaster Payments (Nov. 2, 1982) 15.

B. Application of the Law.

Having reviewed the relevant legislative materials under the SDPP, we next review analogous case law to assist us in evaluating the statutes we have discussed. We find our recent decision in Allison v. Block, 723 F.2d 631 (8th Cir. 1983), to be highly instructive. In that case, we considered the Secretary's failure to implement a program entirely, not simply his failure to

grant aid in a particular case.[2] The Allisons, who had defaulted on Farmers Home Administration (FmHA) loans, sued the Secretary of Agriculture seeking a deferral of the foreclosure of their farm. The district court enjoined foreclosure on the Allisons' farm pending the Secretary's compliance with the deferral statute, 7 U.S.C. § 1981a (1982),[3] and we affirmed.

In Allison, as in this case, the Secretary argued that, because section 1981a establishes no administrative procedural requirements nor substantive rights, the statute does not require any administrative action. Id. at 634. In rejecting this argument, we observed that the Secretary's authority to defer foreclosure under section 1981a was predicated on two actions by the borrower which implicate procedural protec-

tions. First, the borrower must specifically request relief and, second, he must show that, due to circumstances beyond his control, he is temporarily unable to make payments without unduly impairing his standard of living. Id. Close reading of these provisions of the statute and the legislative history revealed that Congress intended that the Secretary notify borrowers of the availability of relief and that he promulgate "a uniform policy under which borrowers can make the requisite request and prima facie showing." Id. (citing the statute and legislative history stressing, among other things, that the statute's objective was to "giv[e] people a chance" at remaining solvent in farming).

In addition to finding the need for these procedural standards, we also

determined in Allison that section 1981a "also requires the development of substantive standards at the agency level to guide the Secretary's discretion in making individual deferral decisions." Id. at 637. This conclusion was based upon the language in the statute which imposed upon the borrower the need to make a prima facie showing of circumstances beyond the farmer's control and the potential for an impaired standard of living. Finally, finding the terms "policy" and "program" in the statute, we concluded that "Congress surely would not consider an empty procedural shell, with no substantive measure of relief, to be a policy at all." Id.

With the methodology of the Allison case as our guide, we find that the Special Disaster Payments Program

presents a straightforward case which compels judicial review of agency inaction. Despite the fact that the statute specifies three criteria for determining the inadequacy of federal crop insurance, the Secretary has deliberately taken no steps to implement proper procedures to protect applicants from potential abuses of discretion under the statute. Moreover, the criteria presuppose findings about the inadequacy of crop insurance; as in Allison, the criteria suggest a "prima facie standard of eligibility for relief," id. at 637, yet without substantive elaboration by the Secretary, the criteria and the relief program become no more than "an empty procedural shell," and the clear intent of Congress to establish a program is thwarted. We also observe that, as was the case in

Allison, the legislative history of this measure relies on the word "program," which becomes nonsensical unless the Secretary promulgates procedural and substantive standards under which disaster assistance can be disbursed. S.Rep. No. 126, 97th Cong., 1st Sess., 111, reprinted in 1981 U.S.Code Cong. & Ad.News 2076. Given the clear guidance of the statute, its supporting materials and case law, then, we find ample law to apply and we reject the district court's suggestion that judicial review was foreclosed by an absence of law.[4]

It is not the business of this Court to order the Secretary to make payments under the SDPP to specific farmers. But when Congress has created a program which contemplates that such payments will be made in appropriate circumstances, it is the clear duty of

the Secretary to promulgate regulations which carry out the intent of Congress.

III. STANDING.

The State of Iowa also challenges the district court's conclusion that the State lacked standing to pursue this litigation, either by virtue of its own interests, or under a parens patriae theory.[5] We consider each in turn.

A. The State's Standing to Sue on Its Own Behalf.

As the courts have frequently noted, standing requirements arise out of the Constitution and out of the courts' self-imposed prudential limitations on their own jurisdiction. See Allen v. Wright, ___ U.S. ___, ___, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556, 569 (1984). By thus carefully limiting the nature of the cases they hear, the federal courts "put the decision as to

whether review will be sought in the hands of those who have a direct stake in the outcome," Sierra Club v. Morton, 405 U.S. 727, 740, 92 S.Ct. 1361, 1369, 31 L.Ed.2d 636 (1972), and they "assure[] an actual factual setting in which the litigant asserts a claim of injury in fact." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 759, 70 L.Ed.2d 700 (1982). With this end in mind, we review the sources and nature of the standing limitation.

Under Article III of the Constitution, the judicial power of the United States is limited to the resolution of "case" and "controversies." This familiar language has been interpreted by the Supreme Court "at an irreducible minimum" to require one seeking the

courts' protection to "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' * * and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge, 454 U.S. at 472, 102 S.Ct. at 758 (citations omitted).

The second category of self-imposed standing limitations are prudential principles which underscore the limitations embodied in Article III. Under these guidelines, the Court has required that a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Weldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 445 L.Ed.2d 343

(1975). Moreover, under this principle, the federal courts should eschew "abstract questions" and "generalized grievances" which afflict a broad spectrum of the public. Id. at 499-500, 95 S.Ct. at 2205. Finally, the Court has drawn a requirement which links the party seeking relief to the provision on which he relies: the plaintiff's complaint must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Organizations v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970).

The Supreme Court's most recent standing discussion acknowledges the lack of "precise definitions" in this area and warns that the standing determination must not be converted to a

"mechanical exercise." Allen v. Wright, ___ U.S. ___, ___, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556, 570 (1984). The Court urged "careful judicial examination of a complaint's allegations" which might include the following questions:

> Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

Id.

Applying these tests to the facts in this case, we turn first to the constitutional issues of an injury in fact, its causal relationship to the defendant and the likelihood of redress by the remedy the appellants seek. In attempting to establish that it sustained an injury in fact, the State

alleges that, but for the Secretary's implementation of these disaster relief programs, agriculture production will suffer, which will dislocate agriculturally-based industries, forcing unemployment up and state tax revenues down. As a result, the State will face increased responsibility for the welfare and support of its affected citizens while its available tax revenues are declining. The district court found that these injuries were "generalized grievances, shared by each citizen of Iowa," and it concluded that these injuries "fail to constitute distinct, palpable injuries to the State as a state."[6] We agree.

In reaching this conclusion, we follow the reasoning of the District of Columbia Circuit in Commonwealth of Pennsylvania v. Kleppe, 533 F.2d 668

(D.C.Cir.), cert denied, 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 584 (1976), in which that Court denied standing to state officials seeking assistance from the Small Business Administration in rebuilding hurricane-ravaged businesses in Pennsylvania. That Court acknowledged that depleted tax revenues might be an actual economic harm to the State's interests, id. at 672, but it denied standing on the ground that this type of economic loss "is the sort of generalized grievance about the conduct of government, so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing." Id. It regarded the tax loss as "largely an incidental result of the challenged action" and required "some fairly direct link between the state's status as a collector and

recipient of revenues and the legislative or administrative action being challenged." Id. See also Warth v. Seldin, 422 U.S. 490, 504-07, 95 S.Ct. 2197, 2207-09, 45 L.Ed.2d 343 (1975) (appellants failed to allege "an actionable causal relationship" between appellee's zoning practices and appellants' asserted injury).

Conversely, the determination that the State of New York had standing to sue the federal Bureau of the Census in Carey v. Klutznick, 637 F.2d 834, 838 (2d Cir. 1980), was based on a loss to the State more closely linked to the act in question. In that case, the State alleged that the census had undercounted residents of the City of New York, which had the effect of diluting the votes of city residents and distorting legislative reapportionment leading to under-

representation of the city in Congress. The Carey Court found a "concrete harm" in dilution of votes and reduction of federal funds, and concluded that the injury was "traceable to the Bureau's actions." Id. at 838, citing City of Camden v. Plotkin, 466 F.Supp. 44, 47-51 (D.N.J. 1978) (citizens who challenged census undercounts alleging loss of funds "established both an injury fairly traceable to the Census Bureau and a substantial probability" that court intervention will remedy the plaintiffs' injury). Likewise, in a variety of other cases, the Courts have found standing for the state when the link between the state and injury was more direct. State of New York v. Heckler, 719 F.2d 1191, 1195 (2d Cir. 1983) (State has the right to litigate regulation requiring notification of parents

regarding child's use of contraceptives because state might be spending funds with illegal conditions attached); State of California v. Block, 690 F.2d 753, 776 (9th Cir. 1982) (state may challenge environmental impact statement if it is geographically proximate to the site and statute requires state consultation as a prerequisite); Department of Energy v. Louisiana, 690 F.2d 180, 187 (5th Cir. 1982), cert. denied, 460 U.S. 1069, 103 S.Ct. 1522, 75 L.Ed.2d 946 (1983) (state may challenge Department of Energy regulations which affect its finances adversely as a landowner and sovereign).

From these cases, we conclude that the State's alleged injury is insufficiently proximate to the actions at issue and the remedy to be offered by this action an insufficient guarantee of solvency to warrant state standing in

this case. In the words of the Kleppe Court, "the unavoidable economic repercussions of virtually all federal policies, and the nature of the federal union as embodying a division of national and state powers, suggest to us that impairment of state tax revenues should not, in general, be recognized as sufficient injury in fact to support state standing." Kleppe, 533 F.2d at 672.

Having found that the State cannot establish a sufficient injury in fact to satisfy the constitutional requirements of standing, we need not consider the prudential standing requirements. We do, however, consider the State's standing as parens patriae.

B. Standing to Sue Parens Patriae on Behalf of the Citizens of Iowa.

The State also maintains that it has standing to sue on behalf of its citizens who might otherwise be unable to seek legal redress for themselves. Although some state parens patriae suits against the federal government have occasionally been allowed in the past,[7] the most recent and well-reasoned discussions of this type of suit disallow its use against the federal government and reserve parens patriae instead for the state to vindicate the rights of its citizens against private defendants.

In the Supreme Court's most recent consideration of the issue, it elaborated the requirements for parens patriae standing in general terms. Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 607, 102 S.Ct. 3260, 3268, 73 L.Ed.2d 995 (1982). In a footnote, however, it qualified that discussion

and disallowed state suits against the federal government on a parens patriae theory:

> A State does not have standing as parens patriae to bring an action against the Federal Government. Massachusetts v. Mellon, 262 US 447, 485-86, 67 L.Ed. 1078, 43 S.Ct. 597 [600] (1923) ("While the State, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois, 180 U.S. 208, 241 [21 S.Ct. 331, 343, 45 L.Ed. 497], it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as parens patriae"). Here, however, the Commonwealth is seeking to secure the federally created interests of its residents against private defendants.

Id. at 610, n. 16, 102 S.Ct. at 3270, n. 10. The D.C. Circuit had previously developed the rationale against state parens patriae suits against the federal government. That Court attributed the

judicial unwillingness to liberalize parens patriae requirements to the general supervisory aspect of federal law and to the basic interests of federalism, "which reduce[] most basically to the avoidance of state interference with the exercise of federal process." Commonwealth of Pennsylvania v. Kleppe, 533 F.2d 668, 677-78 (D.C.Cir.), cert. denied, 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 584 (1976).

Although we recognize the considerable importance that the State of Iowa and its citizens place on the continued vitality of agriculture in the state's economy, we cannot allow the State to proceed as parens patriae in this case. To do so would intrude on the sovereignty of the federal government and ignore important considerations of our federalist system.

IV. CONCLUSION.

Although we conclude that the State is without standing to pursue this action, the remaining appellants may do so on remand. On remand, the district court should promptly hold a hearing to consider appellants' requests for preliminary and permanent injunctive relief compelling the Secretary to implement the SDPP. The district court should note especially the imperative language in the statute ("shall" make disaster payments) and the close similarity that the plight of Iowa's farmers bears to the disasters contemplated by the statute and its legislative history. We express no opinion as to whether the Secretary ought to develop the statute's substantive standards under formal rulemaking procedures or individual adjudications. As we noted in Allison,

formal rulemaking "would better insure a uniform set of substantive standards," but case-by-case adjudication may allow the consistent precedential use of previous decisions. Allison, 723 F.2d at 637-39. Whatever method is chosen, we emphasize that, if the programs are to be implemented, they must be implemented quickly so that eligible farmers may receive assistance at the earliest possible date.

FAGG, Circuit Judge, dissenting.

Plaintiffs challenge the Secretary's refusal to implement the portion of the Special Disaster Payments Program (SDPP) authorizing but not requiring the Secretary to make emergency disaster payments available to farmers if each of three prerequisite conditions is first found to exist in a given situation. 7

U.S.C. § 1444d(b)(s)(D). Plaintiffs contend that in this case each of the necessary conditions is present and further that the Secretary's failure to act is arbitrary, capricious, and an abuse of discretion. 5 U.S.C. § 706(2)(A). The government, however, argues that the "abuse of discretion" standard of review has no application in this case because the Secretary's refusal to implement this program is committed to his discretion by law and is not subject to judicial review. Id. § 701(a)(2).

The court today rejects the government's position and concludes the "[SDPP] presents a straightforward case which compels judicial review of agency inaction." Ante at 351. Having so concluded, the court requires the Secretary to adopt "procedural and

substantive standards under which disaster assistance can be disbursed," id. at 351, and by implication requires the Secretary to implement the payments program and make emergency disaster payments available. I believe the court's decision is contrary to the controlling legal standard and impermissibly diminishes the discretion granted the Secretary by law.

As a general rule, the Administrative Procedures Act provides individuals with the right to seek judicial review of adverse agency action. 5 U.S.C. § 702. This general rule is not without exception, however. One narrow exception is contained in 5 U.S.C. § 701(a)(2) which exempts from judicial review those decisions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

The Supreme Court first examined the scope of this exception in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), in which the Court concluded the exception "is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Id. at 410, 91 S.Ct. at 821 (emphasis added) (citation omitted). Recently, in Heckler v. Chaney, ___ U.S. ___, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), the Court clarified the test to be applied in determining when agency action is committed by law to agency discretion or, in other words, when there is no law to apply. The Court stated:

> [The narrow exception of § 701(a)(2) is applicable and] review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to

> judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in § 706--if no judicially manageable standards are available for judging how and when an agency should exercise its discretion then it is impossible to evaluate agency action for "abuse of discretion."

Id., 105 S.Ct. at 1655 (emphasis added). Applying this standard to the present action, I conclude that no judicially manageable standards exist against which to judge the Secretary's action, and thus the Secretary's action is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

In establishing the SDPP, Congress' primary goal was to "provide for a limited continuation of disaster payments to cover those parts of the

country into which Federal crop insurance has yet to expand." S.Rep. No. 126, 97th Cong. 1st Sess. 76, reprinted in 1981 U.S.Code Cong. & Ad. News 1965, 2041. To accomplish this goal, Congress provided that when natural disaster prevents the planting or harvesting of feed grains but Federal crop insurance is not yet available, the Secretary "shall" make disaster payments to eligible farmers. 7 U.S.C. § 1444d(b)(2)(A)-(C) (emphasis added). These provisions of the SDPP require the Secretary to administer a reasonably well-defined relief program, implemented and placed in effect by Congress. In essence, little is left to the Secretary's discretion.

The remaining provision of the SDPP, id. § 1444d(b)(2)D(), stands in sharp contrast to the subsections just

discussed. This provision authorizes the Secretary to implement a disaster payments program in situations when crop insurance is available. However, unlike those portions of the SDPP that compel the Secretary to make payments when no insurance is available, this provision simply authorizes the Secretary to implement a payments program and provides that "the Secretary may make disaster payments * * * whenever [he] determines that--

> (i) as the result of drought, flood, or other natural disaster, or other condition beyond the control of the producers, producers on a farm have suffered substantial losses of production either from being prevented from planting feed grains or other nonconserving crop or from reduced yields, and that such losses have created an economic emergency for the producers;
>
> (ii) Federal crop insurance indemnity payments and other forms of assistance made available by the Federal

> Government to such producers for such losses are insufficient to alleviate such economic emergency, or no crop insurance covered the loss because of transitional problems attendant to the Federal crop insurance program; and
>
> (iii) additional assistance must be made available to such producers to alleviate the economic emergency.

Id. (emphasis added).

The court relies on these factors, which by implication incorporate the factors mentioned in the legislative history of the SDPP, see S.Rep. No. 126, 97th Cong. 1st Sess. 78, reprinted in 1981 U.S.Code Cong. & Ad.News 1965, 2043 (comments of Senator Heflin), to find that judicially manageable standards exist against which the Secretary's decision can be judged. In so doing, I believe the court not only fundamentally misunderstands the limiting effect these criteria have on the Secretary, but also

misapplies the controlling legal standard recently articulated by the Supreme Court in Chaney, 105 S.Ct. at 1655.

Rather than providing any meaningful standards against which the reasonableness of the Secretary's decision can be judged, these criteria only establish the threshold at which the Secretary has discretion to act and can implement a disaster payments program if he chooses to do so. Absent any one of these factors, the Secretary is without discretion; he can take no action. However, once these criteria are established, and in this case they apparently are, the Secretary is authorized to act. But, unlike the prior provisions, 7 U.S.C. § 1444d(b)(2)(A)-(C), in this instance Congress has seen fit only to provide that the Secretary "may" take

action if he chooses to do so. See id. § 1444d(b)(2)(D). Thus, the Secretary's decision to act or not act is committed to his discretion.

Under Chaney, the issue then becomes whether standards exist under which this court can determine whether the Secretary's refusal to act constitutes an abuse of this discretion. See 5 U.S.C. § 706(2)(A). Such a determination requires this court to find judicially manageable, congressionally implicated standards that indicate those situations in which Congress intended that the Secretary should (rather than could) exercise his discretion. Chaney, 105 S.Ct. at 1655. With respect to this issue, the SDPP and its legislative history provide no guidance. Here, the court effectively views the presence of the criteria under

which the Secretary may take some action as also establishing that the Secretary must take some action. Such a conclusion ignores the plain language of the SDPP.

The court's reliance on the General Accounting Office report is also misplaced. As an initial matter, a report such as this has no binding effect on the Secretary and does not provide this court with law to apply in reviewing the propriety of the Secretary's action. Further, this memo specifically assumes that the Secretary has decided to implement the program in a particular situation and only suggests that the Secretary adopt uniform criteria in determining what specific areas will be eligible to receive payments. Here, the Secretary has determined that the program as a whole will not be implemented. Such a decision is, in my

opinion, within the Secretary's discretion, and as such the General Accounting Office report is irrelevant and of no significance in judging the appropriateness of this decision.

As an additional matter, I believe the prior Eighth Circuit decision in Allison v. Block, 723 F.2d 631 (8th Cir. 1983), is inapplicable in this case. In Allison, Congress gave the Secretary no discretion with respect to developing a loan deferral program. Id. at 635. Rather, the only decision left to the Secretary was in determining whether individual loans would or would not be deferred. Id. In the present action, Congress has committed to the Secretary not only the decision of whether to make certain disaster payments to individuals in specific cases, but has also committed to the Secretary the decision of

whether to implement the program under any circumstances. Had the Secretary determined that the program should be implemented and then refused to promulgate procedures governing general entitlement to the payments being provided, a different question would be presented, and under those circumstances, Allison would be applicable.

I conclude that Congress has placed the determination of whether to implement the discretionary program encompassed in the SDPP entirely with the Secretary. While criteria exist which unless established prevent the Secretary from exercising any discretion, once these criteria have been established, there are no guidelines against which the Secretary's decision to act or not act can be judged. Because no judicially manageable standards exist, no law

exists which can be applied to this case and judicial review is not appropriate.

As a final comment, I disagree with the court's cursory discussion of the anti-injunction provision found in 15 U.S.C. § 714b(c), which provides "no * * * injunction * * *, mesne or final, shall be issued against the [Commodity Credit] Corporation [(CCC)] or its property." 15 U.S.C. § 714b(c). In this action, plaintiffs seek a "preliminary injunction to compel * * * [the] Secretary * * * to implement three federal agricultural disaster relief programs." Ante at 348. Because the SDPP is administered by the Secretary through the CCC, 7 U.S.C. § 1444d(h), this court is without authority to grant plaintiffs the relief they request, and the action should be dismissed.

Further, although implying that its decision is not injunctive in nature, the court effectively enjoins the Secretary (and thus the CCC) and compels him to make available a program the implementation of which has been left entirely within his discretion. This result is contrary not only to the intent of Congress in adopting the SDPP, but is also contrary to the Administrative Procedures Act, recent Supreme Court authority, and the provisions of the Commodity Credit Corporation Act.

For the above stated reasons, I would affirm the decision of the district court.

---

[1] The appellees properly point out that the enabling legislation of the Commodity Credit Corporation (CCC) precludes issuance of an injunction against the Corporation. 15 U.S.C. § 714b(c). ("The Corporation--* * * (c) may sue and be sued, but no attachment,

injunction, garnishment or other similar process, mesne or final, shall be issued against the Corporation or its property.") Because issuance of benefits under the LFP, 7 U.S.C. § 1427, is administered under the auspices of the CCC, we are unable to authorize the relief requested by appellants, even if it were warranted. Similarly, the EFP's implementing legislation provides that "[t]he Secretary shall carry out the program * * * through the Commodity Credit Corporation." 7 U.S.C. § 2267(f). Accordingly, we are unable to consider appellants' request for an injunction under these statutes.

The SDPP, however, presents a different jurisdictional case. We believe that this Court has jurisdiction to require the Secretary to promulgate and implement regulations because as we note in IIB, the framing of regulations fulfills Congress's intent under the SDPP without necessarily requiring the Secretary to make payments or "carry out the program." See Mitchell v. Block, 551 F.Supp. 1011, 1015 (W.D.Va. 1982).

The appellees also argue that judicial review is precluded by 7 U.S.C. § 1429, which provides, in pertinent part, that "[d]eterminations made by the Secretary under this Act shall be final and conclusive." The D.C. Circuit rejected this interpretation in Gonzalez v. Freeman, 334 F.2d 570, 575 (D.C.Cir. 1964), in which it held that agency action "could be immune from judicial review, if ever, only by the plainest manifestation of congressional intent to that effect. * * We find no such intent

reflected in the statute." Based on our reading of section 1429, as well as of the texts and legislative history of the SDPP, we agree and decline to immunize the Secretary in this case under the SDPP statute.

[2] We regard this fact as the essential point distinguishing the Supreme Court's recent decision in Heckler v. Chaney, ___ U.S. ___, 105 S.Ct. 1649, 84 L.Ed.2d 714 (Mar. 19, 1985), from Allison and the case at bar. In Heckler, the Court extended the language of 5 U.S.C. § 701(a)(2) (which excludes from judicial review "agency action * * * committed to agency discretion by law") to insulate from review the FDA's decision not to enforce the law proscribing unapproved use and misbranding of a drug. We believe that Heckler's consideration of an agency's decision not to enforce the law in a single instance presents an issue distinguishable from the Secretary's decision not to promulgate general regulations embodying the intent of Congress.

In addition, by analogy, the Court addresses and distinguishes the Secretary's inaction in the present case: "If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under section 701(a)(2), and courts may require that an agency follow that law." Id. ___ U.S. at ___, 105 S.Ct. at 1657.

[3] Section 1981a provides:

> In addition to any of the authority that the Secretary may have to defer principal and interest and forego foreclosure, the Secretary may permit, at the request of the borrower, the deferral of principal and interest on any outstanding loan made, insured, or held by the Secretary under this chapter, or under the provisions of any other law administered by the Farmers Home Administration, and may forego foreclosure of any such loan, for such period as the Secretary deems necessary upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments of such principal and interest when due without unduly impairing the standard of living of the borrower. The Secretary may permit interest that accrues during the deferral period on any loan deferred under this section to bear no interest during or after such period: Provided, That if the security instrument securing such loan is foreclosed such interest as is included in the purchase price at such foreclosure shall become part of the principal and draw interest

> from the date of foreclosure at the rate prescribed by law.

7 U.S.C. § 1981a (1982).

[4] As a separate issue on appeal, the appellants also challenge as erroneous the district court's reliance on "pragmatic considerations" which led it to defer to the Secretary's expertise and to conclude that implementation of these programs was not a proper subject for judicial review. In a recent case, this Court reviewed the pragmatic considerations which might influence the Court's decision:

> Among those pragmatic considerations are the nature of the administrative expertise involved, whether "there are discernible guidelines against which the agency decision may be measured," Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574, 579 (3d Cir. 1979), and whether the decision is the product of "political, military, economic, or managerial choices that are not really susceptible to judicial review." Id.

Story v. Marsh, 732 F.2d 1375, 1379 (8th Cir. 1984).

Although the resolution of this issue is implicit in our discussion of the district court's subject matter jurisdiction, reconsideration of the issue from this angle might be useful.

It seems clear that the issue presented in this appeal does not turn on technical issues of the agency's substantive expertise. Cf. Tuepker v. Farmer's Home Administration, 708 F.2d 1329, 1332 (8th Cir. 1983) (where Court found judicial review inappropriate, appellant had made "no claim alleging a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination' * * * [nor did he contend] that the FmHA made no appraisal of his farm.") Rather, as is clear from our discussion of the jurisdictional issue, we are met with the purely legal issue of whether there was law to apply in considering whether the agency acted contrary to Congress's intent in failing to implement the program at issue. No questions of agricultural economics arise on this consideration, and we are able to resolve the matter from a purely legal inquiry, which places the case within the courts' area of expertise.

[5] The Secretary does not contest the standing of the individual farmers as plaintiffs-intervenors to the litigation. Accordingly, they may remain as named parties.

[6] Although this kind of injury does not establish the necessary kind of injury-in-fact for the State to sue on its own behalf, it is the type of injury on which the State might base a parens patriae action against a private defendant. For the reasons we outline below,

however, parens patriae is also an inappropriate basis for standing where the State sues the federal government.

[7] New York v. United States, 331 U.S. 284, 67 S.Ct. 1207, 91 L.Ed. 1492 (1947) (approving state standing without discussing parens patriae); Carey v. Klutznick, 637 F.2d 834, 838 (2d Cir. 1980) (same); Washington Utilities and Transportation Commission v. F.C.C., 513 F.2d 1142, 1145-46 (9th Cir.), cert. denied, 422 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975) (same); State of Florida v. Weinberger, 492 F.2d 488, 493-94 (5th Cir. 1974) (same).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-2278-SI

The State of Iowa, etc., et al.,	*	
Appellants,	*	
vs.	*	Appeal from the United States District Court
John R. Block, etc., et al.,	*	for the Southern District of Iowa
Appellees.	*	

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Judges McMillian, Fagg, Bowman and Wollman would have granted the petition.

Petition for rehearing by the panel is also denied.

Judge Donald R. Ross did not participate.

December 5, 1985

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THE STATE OF IOWA, ex rel., THOMAS J. MILLER Attorney General of Iowa, Plaintiff, vs. JOHN R. BLOCK, in his official capacity as Secretary of the United States Department of Agriculture; et al., Defendants.	CIVIL NO. 84-356-A RULING AND ORDER ON MOTION TO DISMISS

Plaintiffs' motion for preliminary injunction and defendants' motion to dismiss came on for hearing August 10, 1984. Appearances are noted in the Clerk's minutes for that date. Although defendants requested a ruling on their motion to dismiss before hearing on the

motion for preliminary injunction, the Court determined that it was in the interest of justice and judicial efficiency to submit the motions together. Evidence on the motion for preliminary injunction was received on August 10, 1984, and statements of counsel on both motions were heard on August 13, 1984.

After having heard the statements of counsel and the testimony, reading the affidavits, and reviewing the written briefs and the remainder of the file, the Court concludes that the defendants' motion to dismiss must be sustained.

This action was initially brought by the State of Iowa under the Federal Administrative Procedure Act's judicial review provisions, 5 U.S.C. sections 701-706 [hereinafter "APA"], in an

effort to compel John R. Block, Secretary of the United States Department of Agriculture, to implement five federal agricultural disaster relief programs[1] in Iowa. Several Iowa farmers intervened as plaintiffs in the action after defendants filed their motion to dismiss. Plaintiffs contend that defendants' failure to implement the five programs wrongfully contravened the intent of Congress stated in the statutory provisions providing for the programs. According to plaintiffs, Mr. Block's failure to implement the five programs to relieve the drought-stricken conditions of farmers in several Iowa counties, was arbitrary, capricious, an abuse of discretion, and a violation of the separation of powers doctrine. Plaintiffs ask the Court to hold Mr. Block's failure to act unlawful under 5

U.S.C. section 706, and to issue a preliminary and permanent injunction compelling defendants to exercise their discretion to implement the five programs.

Defendants moved to dismiss the State of Iowa for lack of standing, and to dismiss the entire action for lack of subject matter jurisdiction. The Court will consider each of defendants' contentions separately.

I. State of Iowa's Standing.

The State of Iowa has brought this action as parens patriae on behalf of its citizens and on its own behalf because the economic well-being of the State will be injured if substantial numbers of Iowa farmers are forced out of business due to defendants' failure to implement the five agricultural disaster relief programs.

A. Parens Patriae Standing.

In Massachusetts v. Mellon, 262 U.S. 447 (1923), the State of Massachusetts sought to represent its citizens against the United States Secretary of the Treasury in a challenge to the constitutionality of a certain federal statute. The Court held:

> It cannot be conceded that a State, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois, 180 U.S. 208, 241), it is no part of its duty or power to enforce their rights in respect to their relations with the Federal Government. In that field it is the United States, and not the State which represents them as parens patriae. . . .

Massachusetts v. Mellon, 262 U.S. at 485-86. Several courts read Mellon as prohibiting states from suing as parens

patriae the federal government. E.g., Pennsylvania v. Porter, 659 F.2d 306, 317 (3d Cir. 1981) (interpreting prior caselaw), cert. denied, 458 U.S. 1121 (1982); Graham v. Schweiker, 545 F. Supp. 625, 627 (S.D. Fla. 1982). In Pennsylvania v. Kleppe, 533 F.2d 668 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976), the Court of Appeals for the District of Columbia Circuit addressed the issue before this Court. The Kleppe Court held that, absent a showing that a state's action as parens patriae would not substantially intrude into the discretionary administrative workings of the federal agency, the federal government is the only proper party to act as parens patriae for citizens seeking benefits flowing directly from the federal government. Id. at 679-80. The State does not contend that this

action would not constitute a substantial intrusion into the discretionary administration of the United States Department of Agriculture. Thus, under the pre-July 1982 precedent, the State of Iowa would not have standing to sue as parens patriae.

In July 1982, the United States Supreme Court handed down Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982), holding that Puerto Rico could represent its citizens as parens patriae in an action against private persons for violating a federal statute. The Court carefully pointed out, however, that the action could not have been maintained against the federal government. Four members of the Court stated a proposition that the concurring justices did not dispute: "A State does not have standing as parens patriae to

bring an action against the Federal Government." Id. at 610 n. 16.

Thus, it appears that the Supreme Court has recognized the continuing viability of the holding in Mellon. Applying that rule, the Court concludes that the State does not have standing to bring this action as parens patriae.

B. Proprietary Interest Standing.

The State of Iowa alleges that defendants' failure to implement the agricultural disaster relief programs will harm the State by causing increased unemployment, decreased tax revenues, injury to the State's interest in insuring equal treatment in the federal system, injury caused by increased fiscal outlays resulting from social dislocation, and general injury to the economic well-being of Iowa citizens. The State admits that neither it nor any

of its agencies would receive any relief under any of the five programs, and that it takes no part in administering any of the programs.

1. Are the State's alleged interests "proprietary?"

In Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 591 (1982), the United States Supreme Court distinguished between proprietary interests--which can serve as the basis of the State's action--and quasi-sovereign interests, which can form the basis only for an action as parens patriae. The Court stated that a proprietary interest is one a state acquires by owning property or participating in a business-type venture, id. at 601-02, while a quasi-sovereign interest is typified by a state's concern for the health and

well-being of the state's residents in general or a desire not to be discriminatorily denied its rightful status within the federal system. Id. at 607-08. It is apparent that the State's alleged injuries of increased unemployment, disparate treatment, and general injury to the economic well-being of the state are quasi-sovereign in character. Thus, such injuries, although appropriate for forming the basis of standing as parens patriae, are not sufficient to form the basis of standing on proprietary interests.[2] Pennsylvania v. Kleppe, 533 F.2d 668, 671 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976).

2. Has the State shown that it has suffered injury in fact and that the State's injuries are not merely generalized grievances?

In order to state a cognizable Article III case and controversy, the State must show that its own alleged injuries are actual or imminent, that the injuries can be fairly traced to the challenged inaction of the Secretary, and that the injury can be redressed by specific judicial relief. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472-74 (1982); Cason v. Pierce, 719 F.2d 931, 933 (8th Cir. 1983). In addition, in order to show that it is a proper party-plaintiff, the State must show that its injuries are to itself, and not generalized grievances shared in substantially equal measure by the citizens of Iowa. Warth v. Seldin, 422 U.S. 490, 499-500 (1975). Several of the State's alleged injuries, while sufficient to support standing as parens

patriae against a private defendant, fail to constitute distinct, palpable injuries to the State as a state. The State's alleged injuries of increased unemployment, increased social outlays due to social dislocation, and general injury to economic well-being are so speculative and causally removed from the alleged wrong, that they do not constitute injury in fact. The alleged injuries to the State in the forms of increased unemployment, decreased tax revenues, and disparate treatment are generalized grievances, shared by each citizen of Iowa. See Pennsylvania v. Kleppe, 533 F.2d 688, 672 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976). In summary, the Court concludes that the State has failed to allege an injury to itself that would constitute a sound basis for standing in federal court.

3. Is the State arguably within the zone of interests protected by the agricultural disaster relief programs?

In order to maintain standing to sue, the State must also show that its alleged interests in this suit are arguably within the zone of interests protected by any one of the five agricultural disaster relief programs. Association of Data Processing Servs. v. Camp, 397 U.S. 150, 154-56 (1970); Taylor v. Jones, 653 F.2d 1193, 1207-08 (8th Cir. 1981). The language of the statutes establishing the programs indicate that Congress intended to relieve farmers stricken by agricultural disasters. The State of Iowa is not an intended beneficiary of any of the programs and has no part in administering them. Under these circumstances, the Court concludes that the State also lacks standing because it

is not even arguably within the zone of interests created by the programs. Pennsylvania v. Kleppe, 533 F.2d 668, 671-72 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976); see Granville House, Inc. v. Department of Health & Human Servs., 715 F.2d 1292, 1299 (8th Cir. 1983); Kozera v. Spirito, 723 F.2d 1003, 1007 (1st Cir. 1983); Comment, State Standing to Challenge Federal Administrative Action: A Re-examination of the Parens Patriae Doctrine, 125 U. Pa. L. Rev. 1069, 1095-98 (1977).

In summary, the Court concludes for the reasons stated above that the State lacks standing to bring this action on the basis of its asserted proprietary interests.

II. Subject Matter Jurisdiction.

The parties agree that the implementation of the agricultural

disaster relief programs is committed to the discretion of the Secretary of the United States Department of Agriculture. Plaintiffs contend that the Secretary abused that discretion by failing to implement the programs in several Iowa counties after the drought in 1983 ravaged southeast Iowa, and that his exercise of discretion is reviewable under the APA, 5 U.S.C. section 706(2)(a).[3] Defendant contends that the discretion to implement the programs is vested solely in the Secretary, and that such discretion is not subject to judicial review, pursuant to the APA, 5 U.S.C. section 701(a)(2).[4]

The exception to judicial review established by Section 701(2)(a) "is a very narrow exception . . . . The administrative history of the Administrative Procedure Act indicates

that is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). There is a presumption that agency action is reviewable, which is rebutted only when the reviewing court has no law to apply. Tuepker v. Farmers Home Administration, 708 F.2d 1329, 1331-32 (8th Cir. 1983).

In determining whether there is law to apply, federal courts have analyzed pragmatic considerations as to whether an agency determination is the proper subject of judicial review. These pragmatic considerations include whether the challenged agency action is of a type Congress intended to be left to a reasonable exercise of agency expertise, and whether the problem that formed the

basis of the challenged agency action is one suitable for judicial determination. Id. at 1332; Chaney v. Heckler, 718 F.2d 1197, 1195 (D.C. Cir. 1983); see Cooperative Power Association v. Federal Energy Regulatory Commission, 733 F.2d 577, 581 (8th Cir. 1984) (per curiam); United States v. 1426.5 Acres of Land, 732 F.2d 1375, 1379-81 (8th Cir. 1984); United States v. Wiley's Cove Ranch, 295 F.2d 436, 440-43 (8th Cir. 1961).

The language used by Congress in the statutes establishing the five agricultural disaster relief programs indicates that Congress intended to make a broad delegation of power to the Secretary. None of the language mandates that the Secretary implement the programs under certain conditions. Instead, Congress used permissive language, allowing the Secretary to set

the terms of implementation he determined to be in the national interest. This broad delegation of authority by Congress leaves the Court with little, if any, standard for reviewing the Secretary's failure to implement the programs.[5]

Pragmatic considerations also incline the Court to find that the Secretary's failure to implement the five programs in southeast Iowa is not a proper subject for judicial review. Throughout the years Congress has authorized a broad range of discretionary assistance programs to deal with agricultural disasters. Recognizing that the Secretary possesses expertise in agricultural affairs and the means of evaluating the ever-changing national agricultural conditions, the Congress often vested

discretion in the Secretary to determine whether to implement such programs. In deciding which programs to implement and the areas or individuals that are entitled to assistance, the Secretary must consider the level of relief required, the national and international ramifications of implementation, the level of relief afforded by programs already implemented, and various other economic and managerial issues. For the Court to fairly and fully review the discretionary decision of the Secretary, all of the factors that entered into the decision would have to be brought before the Court, if that would be possible. In addition, the Court does not believe that it could properly review the Secretary's determinations--which were certainly based on data gathered from national and international sources--and

then limits its decision whether the Secretary acted arbitrarily to the situation presented in several southeast Iowa counties.

Were it to review the Secretary's decision, the Court would have no difficulty in finding that the emergency assistance programs actually implemented by the Secretary did not provide sufficient relief to the livestock farmers in southeast Iowa who find themselves in precarious financial situations due, at least in part, to the adverse weather conditions of the past three years. But it is not for the Court to substitute its judgment for that of the Secretary under the circumstances presented here.

As indicated above, the Secretary must look far beyond the particular local situation in exercising his

discretion. The national and international concerns, the empirical data, the ramifications of particular actions including the effect of the national budget and other factors that may be involved in a particular decision are so far-reaching and complex that this discretionary determination is not a proper subject of judicial review. Accordingly, the Court shall grant the motion to dismiss for lack of subject matter jurisdiction.

IT IS THEREFORE ORDERED that defendants' motion to dismiss plaintiff State of Iowa for lack of standing shall be and is hereby granted.

IT IS FURTHER ORDER that defendants' motion to dismiss this action for lack of subject matter jurisdiction shall be and is hereby granted.

Signed this 22nd day of August, 1984.

W. C. STUART, CHIEF
JUDGE, SOUTHERN
DISTRICT OF IOWA

---

[1]The five programs are (1) the Emergency Feed Program, 7 U.S.C. Section 2267; (2) the Livestock Feed Program, 7 U.S.C. Section 1427; (3) the Disaster Reserve Program, 7 U.S.C. Section 1427a; (4) a prevented-planting and reduced-yield program, 7 U.S.C. Section 1444d; and (5) a program for the orderly disposal of stockpiled grain, 7 U.S.C. Section 1851.

[2]This holding is closely tied to the Court's determination of the State's failure to show sufficient injury in fact on these grounds, infra.

[3]Section 706(2)(a) provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

> . . .
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . .

[4]Section 701(a)(2) provides:

> (a) This chapter applies, according to the provisions thereof, except to the extent that-- . . .
>
> (2) agency action is committed to agency discretion by law.

Section 706 of the APA provides the standards for reviewing agency action after it has been determined that judicial review exists. Reviewability is determined by section 701. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971).

[5]The Court recognizes that the Secretary's regulation, 7 C.F.R. Section 1475.53, presents the judicial review issue in a distinct procedural context. However, the Court accepts the defendants' statement that the Livestock Feed Program, 7 U.S.C. Section 2267, could be re-implemented by the Secretary at any time by merely rescinding the Section 1475.53.

(3)

Supreme Court, U.S.
FILED
MAY 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1481

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF IOWA EX REL. THOMAS J. MILLER, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

RICHARD E. LYNG, SECRETARY OF AGRICULTURE, AND THE DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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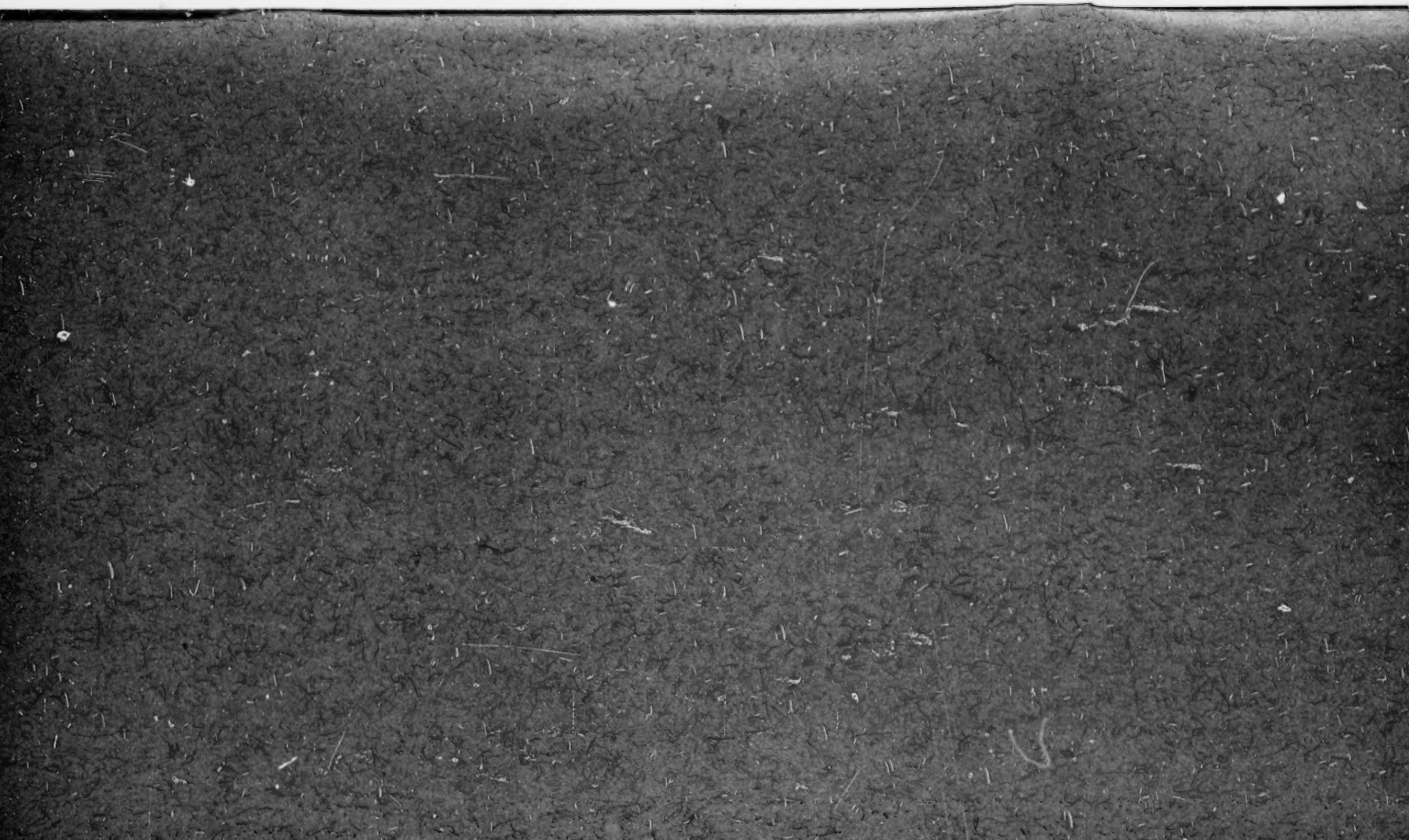

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1481

STATE OF IOWA EX REL. THOMAS J. MILLER, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

RICHARD E. LYNG, SECRETARY OF AGRICULTURE, AND THE DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, the State of Iowa and several individual Iowa farmers, contend that the court of appeals erred in affirming the dismissal of their claims for relief under the Livestock Feed Program (LFP), 7 U.S.C. 1427, and the Emergency Feed Program (EFP), 7 U.S.C. 2267, on the basis that the claims are barred under the anti-injunction provision of 15 U.S.C. 714b(c). They also contend that the court of appeals erred in affirming the dismissal of the State's complaint for lack of standing.

1. a. This suit was brought by the State of Iowa and several individual Iowa farmers, seeking an injunction requiring implementation of various federal agricultural disaster relief programs to relieve the effects of the 1983

drought.[1] The district court denied petitioners' motion for a preliminary injunction and dismissed the complaint. It concluded (Pet. App. 68-76) that the permissive language authorizing each of the programs in issue committed implementation decisions to agency discretion by law, and therefore the Secretary's decision not to implement them was not judicially reviewable. See 5 U.S.C. 701(a)(2). The district court also held that the State of Iowa lacked standing because (1) Iowa's allegations that denial of relief would lead to increased unemployment, depletion of tax revenues, unequal treatment of its citizens in the federal system, and general loss of social and economic well-being of its citizens, were insufficient to confer standing on the State to sue in its own behalf, and (2) the State could not maintain an action as parens patriae on behalf of its citizens against the federal sovereign (Pet. App. 58-68).

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[1]See Complaint, Clerk's Record in the District Court (C.R.) (filed in lieu of an appendix in the court of appeals) at C.R. 1-14, and Complaint of Applicants for Intervention, C.R. 35-55. The Secretary had already provided substantial assistance to Iowa farmers under the federally-subsidized crop insurance program (see 7 U.S.C. 1501 *et seq.*) (almost $40 million in indemnities for the 1983 crop year in Iowa); federal loan programs (including more than $100 million in disaster emergency loans and economic emergency loans under 7 U.S.C. 1961); a program for the sale of stockpiled feed grain at reduced prices (see 7 U.S.C. 1427) (Iowa farmers purchased more than 2.6 million bushels of such grain in late 1983 and early 1984); and by relaxing the restrictions on conservation use acreage under 7 U.S.C. 1444d(e)(4) while permitting farmers to continue to receive federal cash and in-kind benefits under the conservation program. C.R. 20-23.

b. Petitioners appealed the decision as to three of the programs: the Livestock Feed Program (LFP), 7 U.S.C. 1427;[2] the Emergency Feed Program (EFP), 7 U.S.C. 2267;[3] and the discretionary portion of the Special Disaster Payment Program (SDPP), 7 U.S.C. 1444d(b)(2)(D).[4]

The court of appeals unanimously affirmed the dismissal of the claims under the LFP and the EFP, and the dismissal of the State of Iowa for lack of standing (Pet. App. 46 n.1, 17-32). The court noted (*id.* at 46 n.1) that the enabling legislation of the Commodity Credit Corporation (CCC) "precludes issuance of an injunction against the Corporation." See 15 U.S.C. 714b(c) ("[t]he Corporation—* * * [m]ay sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property"). Because issuance of LFP and EFP benefits is carried out by the CCC, the court held it was "unable to authorize the relief requested by [petitioners] even if it were warranted," and

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[2]In relevant part, 7 U.S.C. 1427 provides that "[t]he Commodity Credit Corporation [CCC] * * * may make feed [grain] owned or controlled by it available at [substantially reduced prices]" to assist livestock producers in distress caused by natural disaster where "the Secretary determines that an emergency exists which warrants such assistance."

[3]7 U.S.C. 2267(a) provides, in relevant part, that the Secretary of Agriculture "may implement [a program of cash payments to livestock producers, administered by the CCC (see 7 U.S.C. 2267(f)), for the purchase of feed grain] * * * where, because of * * * natural disaster, the Secretary determines that an emergency exists."

[4]The discretionary SDPP, 7 U.S.C. 1444d(b)(2)(D), provides that the "Secretary may make disaster payments [notwithstanding the availability of crop insurance, which would ordinarily preclude such payments, 7 U.S.C. 1444d(b)(2)(C)] * * * whenever [he] determines that" "substantial" production losses due to natural disaster have caused an "economic emergency" for which crop insurance and other federal assistance are "insufficient," and "additional assistance must be made available to * * * producers to alleviate" the emergency.

was "unable to consider [petitioners'] request for an injunction under these statutes" (Pet. App. 46-47 n.1).[5]

With respect to Iowa's standing, the court of appeals agreed (Pet. App. 17-27) with the district court that the State's allegations were generalized grievances common to all of its citizens, and " 'fail to constitute distinct, palpable injuries to the State as a [S]tate' " (*id.* at 21-22 (footnote omitted)). Such economic consequences are " 'incidental' " and too " 'distantly related to the wrong for which relief is sought * * * to be cognizable for purposes of standing' " (*id.* at 23, citing *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 672 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976), and *Warth* v. *Seldin*, 422 U.S. 490, 504-507 (1975)), and "the remedy to be offered by this action [is] an insufficient guarantee of solvency to warrant state standing in this case" (Pet. App. 26-27). Nor could the State sue as parens patriae on behalf of its citizens (*id.* at 27-30), because a state does not have parens patriae standing to bring an action to enforce its citizens' federal rights with respect to the federal government (*ibid.*). See *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923) ("In that field it is the United States, and not the State, which represents them as *parens patriae*.").

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[5]With Judge Fagg dissenting, the panel reversed the dismissal of the SDPP claim and remanded the case for further proceedings on petitioners' request for an injunction requiring implementation of the discretionary SDPP (Pet. App. 5-17, 31-51). Although the SDPP is also administered by the CCC, the majority ruled that Section 714b(c) does not preclude judicial relief. The court remanded the case and directed the district court to "consider [petitioners'] requests for * * * injunctive relief compelling the Secretary to implement the SDPP" (Pet. App. 31).

The government has filed a petition for a writ of certiorari challenging the Eighth Circuit's judgment on the discretionary SDPP claims (No. 85-1818). The Court need not grant the instant petition in order to determine the issues presented in the government's petition.

2. The portions of the decision below for which petitioners seek review are correct and do not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

a. Petitioners' contention (Pet. 25-31) that Section 714b(c) does not bar their claims is without merit. They describe this suit (Pet. 25) as an "attack under the Administrative Procedure Act * * * to challenge program rules promulgated by the Secretary or to force the Secretary to comply with rules already in place," and they contend that the anti-injunction provision cannot prevent a court from entertaining such a suit simply because the programs involved are administered by the CCC. The relief they seek, however, goes well beyond routine review of agency action. Petitioners' complaints request an "injunction compelling [respondents] to exercise their discretion and implement the [described] disaster relief programs" (C.R. 8, 42). As the complaints, their attachments (letters from the Governor of Iowa and an Iowa Congressman asking the Secretary for assistance to Iowa farmers under the programs (C.R. 9-12)), and the affidavits of individual petitioners (C.R. 44-55) show, the remedy petitioners seek is injunctive relief requiring the implementation of programs *for the purpose of granting benefits*. Such an order would clearly amount to an injunction against the CCC, the entity that would pay the requested benefits. But the anti-injunction provision was designed to preclude just such interference with the functions of the CCC. See S. Rep. 1022, 80th Cong., 2d Sess. 10 (1984) (the preclusion of "attachment, injunction, garnishment, or similar process * * * against the Corporation or its property" is intended to avoid the "possible detriment to the Government through hindrance or obstruction of the Corporation's operations, if it were made amenable to such processes").

There are no appellate decisions to the contrary. *Mitchell* v. *Block*, 551 F. Supp. 1011 (W.D. Va. 1982), relied on by petitioners (Pet. 28-31), is the only other decision construing the anti-injunction provision. In *Mitchell*, the district court concluded that it had jurisdiction notwithstanding Section 714b(c) to require the Secretary to issue a grade for untied burley tobacco (when the Secretary had determined to grade only tied or baled tobacco), although such grading would trigger eligibility for price support paid by the CCC. It is clearly distinguishable from this case. The tobacco price support program in *Mitchell* had already been implemented, and all that remained to be determined was how a producer must prepare his commodity for market in order to qualify for benefits. In that context, the court ruled merely that the Secretary may not create arbitrary and capricious distinctions between persons otherwise eligible under a program that was already implemented; its order did not constitute an injunction compelling the implementation of a CCC program, as petitioners demand here.[6]

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[6]There is no merit to petitioners' underlying challenge to the Secretary's decision not to utilize the LFP and the EFP. Because of its conclusion that Section 714b(c) bars relief, the court of appeals did not reach this question and it is therefore not properly before this Court.

In any event, as the district court recognized (Pet. App. 71-72), implementation of these programs is committed to agency discretion under the plain terms of the enabling statutes (see notes 2, 3, *supra*). Petitioners have cited nothing in the statutes or elsewhere that would restrict the Secretary's discretion whether to exercise his authority. They argue only that, because the Secretary has issued regulations governing the provision of assistance under these programs once they are implemented (see 7 C.F.R. 1475.50-1475.68 and 1475.1-1475.17), the Secretary must "abide by [these rules]" (Pet. 19) and provide benefits to them. The regulations, however, which generally establish application procedures, eligibility criteria and levels of assistance, do not speak to the question whether to implement the programs in the first instance. Thus, until the Secretary has determined to implement the

b. There is also no merit to petitioners' contention (Pet. 31-37) that the State of Iowa has standing to maintain this suit.[7] The State argues (Pet. 32-33) that its "allegations of fiscal harm" and its "vital interest [as a provider of public services] in maintaining revenues and controlling expenditures" are "similar [to the] fiscal interests" for which courts have found states had standing to sue in their own behalf. The cases cited by the State (Pet. 33) do not support this contention; rather, each premised standing on a much more immediate and direct impact of the challenged federal action on state finance and functions. See *Carey* v. *Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (alleged census undercount would dilute a city's representation in Congress and erode its share of federal aid and revenue sharing funds); *Alabama ex rel. Baxley* v. *TVA*, 467 F. Supp. 791 (N.D. Ala. 1979), rev'd on other grounds, 636 F.2d 1061, 1063-1064 (5th Cir.), cert. denied, 454 U.S. 837 (1981) (state's "proprietary" interest in the interpretation of a federal statute requiring the TVA to maintain its " 'principal office' " within the state); *City of New York* v. *Heckler*, 578 F.

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programs, there is nothing in these regulations with which he is required to comply.

Petitioners' challenge to 7 C.F.R. 1475.53 (Pet. 26-28), which suspends the availability of the EFP after March 9, 1982, is similarly unavailing. In issuing that regulation, the Secretary announced that due to budgetary constraints he would no longer be considering applications for assistance under the EFP, but would reconsider implementing the program should future conditions warrant (47 Fed. Reg. 34356-34357 (1982)). That is plainly within his broad discretionary power under the terms of 7 U.S.C. 2267 and, contrary to petitioners' contention (Pet. 27), does not "abolish [the EFP] altogether by administrative fiat."

[7]There is no question of the standing of the individual farmer petitioners to litigate all the issues the State has attempted to raise in this action. Thus, the state standing question does not affect the outcome of this litigation. Nor, of course, is the State prevented from expressing its views as amicus curiae.

Supp. 1109, 1121 (E.D.N.Y.), aff'd on other grounds, 742 F.2d 729 (2d Cir. 1984), cert. granted, No. 84-1923 (Oct. 7, 1985) (state and city have standing to challenge procedures for determining eligibility for Social Security disability and supplemental security income benefits, since those programs were enacted in part to relieve welfare burdens of state and local governments). Moreover, Iowa's alleged fiscal injury is just the sort of generalized and hypothetical claim of loss of tax revenue and injury to the state's economy as a whole that this Court has frequently rejected as insufficient to confer standing. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48 (1904). See also, *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 672 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976) (footnote omitted) (state's claim that denial of Small Business Administration disaster loans to its citizens would deplete its tax base was "generalized grievance * * * so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing").

The state is also foreclosed from maintaining this action as parens patriae on behalf of its citizens. Although the sort of quasi-sovereign interest in the general well-being of its citizens asserted by the state here would normally support parens patriae standing in other contexts, this Court has recently reconfirmed that "a State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923). Petitioners argue (Pet. 33-37) that *Alfred L. Snapp* reached this question only in dicta, and that courts of appeals are divided on the applicability of *Mellon* to suits such at this one to enforce (rather than to overturn) federal law. The cases they cite to support parens patriae standing, however, all predate *Alfred L. Snapp*, and

either did not involve a suit against the federal government,[8] did not squarely address the question,[9] or did not need to reach the question because the state had standing to sue in its own behalf.[10] In *Pennsylvania* v. *Kleppe*, 533 F.2d at 676-677, a case closely analogous to this one (involving SBA disaster loans), the District of Columbia Circuit stated the principles that govern here:

> The individual's dual citizenship in both state and nation, with separate rights and obligations arising from each, suggests that both units of government act as *parens patriae* within their separate spheres of activity. The general supremacy of federal law gives some reason to conclude that the federal *parens patriae* power should not, as a rule, be subject to the intervention of states seeking to represent the same interest of the same citizens. In the terms used by the *parens patriae* cases, the state can not have a quasi-sovereign interest because the matter falls within the sovereignty of the Federal Government.[11]

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[8] *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945).

[9] *Florida* v. *Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974) (without mentioning the term parens patriae, holding state had standing to challenge regulation governing state licensing board for Medicaid nursing home administrators, based on state's interest "both in the manner in which the Medicaid program is administered vis-a-vis its citizens and in being spared the reconstitution of its statutory program").

[10] *Carey* v. *Klutznick*, 637 F.2d at 838; *Washington Utilities & Transportation Comm'n* v. *FCC*, 513 F.2d 1142, 1152 (9th Cir.), cert. denied, 423 U.S. 836 (1975).

[11] In addition, some courts have held that "*[p]arens patriae* standing also requires a finding that individuals could not obtain complete relief through a private suit." *Abrams* v. *11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982). See also *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 266 (1972); *Pennsylvania* v. *National Association of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975). Here, the individual farmer petitioners are fully able to obtain the relief to which they may be entitled.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1986

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No. _____

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Respondents.

BRIEF OF THE STATES OF MINNESOTA, ILLINOIS, KANSAS, NORTH DAKOTA AND WISCONSIN IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Of Counsel:
NEIL F. HARTIGAN
Attorney General
State of Illinois
ROBERT T. STEPHAN
Attorney General
State of Kansas
NICHOLAS SPAETH
Attorney General
State of North Dakota
BRONSON C. LAFOLLETTE
Attorney General
State of Wisconsin

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
CATHARINE F. HAUKEDAHL
Special Assistant
Attorney General
Counsel of Record
515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-6839
Of Counsel:
JEAN BOLER

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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STATEMENT OF INTEREST

The amici states through their attorneys general respectfully offer this brief in support of the petitioners. This case raises issues of considerable public importance, the resolution of which will directly impact the amici.

Amici are midwestern states whose economies depend largely on agricultural production. Farming and farm-related in-

dustries constitute approximately 25 percent of Minnesota's economic base, and 19 percent of Minnesota's jobs are directly or indirectly related to farming. Interview with Professor Wilbur R. Maki, Agriculture and Applied Economics, University of Minnesota (May 2, 1986). Similarly, in Wisconsin, approximately 26 percent of the value of the State's manufacturing is attributable to agriculture and related business, and 22 percent of the state's jobs are agriculturally related. Wisconsin Department of Agriculture (April 1986) (unpublished).

Because agriculture is vital to the amici, federal agricultural policies and programs have a profound effect on them. This is particularly true now, when the midwestern agricultural economy is in a crisis condition. *See generally* U.S. Department of Agriculture, Financial Conditions of Farmers and Farm Lenders (March 1985); Harl, "The Architecture of Public Policy: The Crisis in Agriculture," presented at the Annual Meeting of the American Agricultural Law Association (October 3, 1985). For example, in 1984, Minnesota's farm equity dropped $8.091 billion, a decline of 22.4 percent. Minnesota Agricultural Statistics Service (November 1985) (unpublished). From June 1, 1984, through June 1, 1985, Minnesota led the nation in the number of farmers lost, as the number of Minnesota farms fell from 101,000 to 96,000. Minnesota Agricultural Statistics Service, AGRI-VIEW, Issue AV-16-85 (Aug. 13, 1985). The 150-page, $16 million farm bill passed by the 1986 Minnesota Legislature is further testimony to the severity of the state's farm crisis.

Under these circumstances, amici have a vital interest in insuring that the Secretary of Agriculture implements farm programs in a manner consistent with Congressional intent. The Eighth Circuit Court of Appeals has interfered with this

interest by holding that states have no standing to sue the federal government as *parens patriae*. Because the decision of the Court of Appeals severely limits the ability of the states to protect the economic well-being of their citizens, amici submit this brief in support of the State of Iowa's petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

The Court should explicitly recognize that the states have standing as *parens patriae* to sue the federal government to enforce a Congressional mandate. The Eighth Circuit Court of Appeals has misinterpreted this Court's precedent as establishing an absolute bar to a state's *parens patriae* action against the federal government and is in conflict with the decisions of several other circuits. The precedent relied upon by the Eighth Circuit should be narrowly construed to prohibit, at most, state *parens patriae* actions brought under the Court's original jurisdiction challenging federal statutes as unconstitutional.

ARGUMENT

I. A STATE WHICH CAN DEMONSTRATE A QUASI-SOVEREIGN INTEREST HAS STANDING AS *PARENS PATRIAE* TO SUE THE FEDERAL GOVERNMENT TO ENFORCE A CONGRESSIONAL MANDATE.

The Eighth Circuit has misinterpreted this Court's precedent as establishing an absolute bar to a state's *parens patriae* action against a federal agency. In holding that the State of Iowa lacked standing to sue the U.S. Department of Agriculture, the Eighth Circuit relied on this Court's decision in

Snapp v. Puerto Rico, 458 U.S. 592 (1982). In *Snapp*, Puerto Rico brought a *parens patriae* action against private individuals and companies, alleging violations of federal law. This Court held that if a state establishes a quasi-sovereign interest, it can bring such an action. *Id.* at 607. However, in a footnote that is clearly dicta, the Court also stated that: "A state does not have standing as *parens patriae* to bring an action against the federal government." *Id.* at 610 n.16. In support of this position the Court cited *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

It is true that the *Snapp* footnote relied upon by the Eighth Circuit sweeps broadly and might appear to prohibit any *parens patriae* action against the federal government. However, the language quoted above should be narrowly construed when considered in light of the holding in *Massachusetts v. Mellon* and the continuing evolution of federal-state relations.

In *Mellon*, Massachusetts attempted, as *parens patriae*, to have the federal Maternity Act declared unconstitutional as outside the scope of Congressional power. This Court held that a state could not bring a *parens patriae* action within the original jurisdiction of the Supreme Court to strike down a federal statute as unconstitutional. The Court held that a state, as *parens patriae*, could not "institute judicial proceedings to protect citizens of the United States from the operations of the statutes thereof." 262 U.S. at 485. Thus, *Mellon* holds only that a state may not stand between its citizens and the affirmative operation of federal law. It does not hold that a state lacks standing to force a federal agency to comply with its statutory mandate, and it should not be so extended.

Several Circuit Courts of Appeal have refused to extend *Mellon* and have recognized *parens patriae* standing when a state sues on behalf of its citizens to enforce a Congressional

mandate. These decisions are in clear conflict with the Eighth Circuit's holding in the instant matter. In *Washington Utilities & Transp. Comm. v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), the state regulatory agency and association of regulatory utility commissioners sought review of an order of the FCC. The Ninth Circuit found the *Mellon* doctrine inapplicable, noting that "Massachusetts sought to litigate a 'question of distribution of powers between the State and the national government'. . . ." *Id.* at 1153, quoting *Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 445 (1945). In contrast, Washington sought "to vindicate the congressional will by preventing what it [asserted] to be a violation of that statute by the administrative agency charged with its enforcement." *Id.* Because of this distinction, the Ninth Circuit found that the state had standing to sue. *See also Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (New York had *parens patriae* standing to sue the Census Bureau for undercounting New York residents); *Florida v. Weinberger*, 492 F.2d 488, 493-94 (5th Cir. 1974) (state had standing to challenge the validity of an HEW regulation).

A growing number of district courts have relied on the *Washington Utilities* rationale. These cases correctly adopt a narrow construction of *Mellon* which permits a state to sue as *parens patriae* to enforce the affirmative obligation of a federal agency. *E.g., City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y.), *aff'd*, 742 F.2d 729 (2d Cir. 1984), *cert. granted*, 106 S. Ct. 57 (1985) (state challenged procedures used in dispensing social security disability and supplemental security income benefits); *Louisiana v. Lee*, 596 F.Supp 645 (E.D.La. 1984), *vacated on other grounds*, 758 F.2d 1081 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1259 (1986) (state sued the Army Corps of Engineers alleging the Corps

violated the National Environmental Policy Act); *Alabama v. Tennessee Valley Authority*, 467 F.Supp. 791 (N.D. Ala. 1979), *rev'd on other grounds*, 636 F.2d 1061 (5th Cir), *cert. denied*, 454 U.S. 837 (1981) (Alabama had standing as *parens patriae* to seek a declaratory judgment against the TVA).

A second ground for limiting *Mellon* is also articulated in some of these cases. In *Mellon*, Massachusetts had invoked the Supreme Court's original jurisdiction. The Court's concern for its own caseload may therefore have been a determining factor in its holding. As this Court has noted, special considerations may call for limited exercise of the Court's original jurisdiction which do not apply when a state brings a *parens patriae* action in federal district court. *Snapp v. Puerto Rico*, 458 U.S. at 603 n.12. *See also* 458 U.S. at 610 (Brennan, J., concurring).

Finally, a broad reading of *Mellon* ignores the dramatic changes in federal-state relations which have taken place in the 63 years since *Mellon* was decided. The federalism *Mellon* sought to protect, "the administrative dualism . . . in which state and federal governments operate in relative autonomy," is extinct. Comment, "State Standing to Challenge Federal Administrative Action: A Reexamination of the *Parens Patriae* Doctrine", 125 U. Pa. L. Rev. 1069, 1087 (1977). Moreover, a state's suit against a federal agency is no more disruptive to the operations of that agency than a suit by a private party. Comment, "Federal Jurisdiction: State *Parens Patriae* Standing in Suits Against Federal Agencies," 61 Minn. L. Rev. 691, 703 (1977). *Mellon* should be read to accommodate the modern, cooperative nature of state-federal relations, especially when a state is not challenging a Congressional mandate but is attempting to enforce it.

CONCLUSION

The Court should grant certiorari in this case to clarify the exact parameters of *Mellon* and whether the dicta in *Snapp* relied upon by the Eighth Circuit is this Court's definitive holding on *parens patriae* standing. The amici states urge the Court to grant certiorari for the reasons stated above and the reasons contained in the petition for writ of certiorari filed by the State of Iowa.

Dated: May 7, 1986.

Respectfully submitted,

Of Counsel:
NEIL F. HARTIGAN
Attorney General
State of Illinois
ROBERT T. STEPHAN
Attorney General
State of Kansas
NICHOLAS SPAETH
Attorney General
State of North Dakota
BRONSON C. LAFOLLETTE
Attorney General
State of Kansas

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
CATHARINE F. HAUKEDAHL
Special Assistant
Attorney General
Counsel of Record
515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-6839
Of Counsel:
JEAN BOLER
Attorneys for the
State of Minnesota

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G. F. HOFFMAN III
Hoffman Law Firm
107 West Ninth Street
Leon, Iowa 50144

Counsel for Petitioners
Danny Gettler, et al.

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Bldg.
Des Moines, Iowa 50319
(515) 281-5164

TIMOTHY D. BENTON
Assistant Attorney General

KEVIN M. KIRLIN
Assistant Attorney General

Counsel for Petitioner,
The State of Iowa

*Counsel of Record

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

NO. 85-1481

STATE OF IOWA EX REL.
THOMAS J. MILLER,
ATTORNEY GENERAL, ET AL.,

Petitioners,

vs.

RICHARD E. LYNG,
SECRETARY OF AGRICULTURE,
AND THE DEPARTMENT OF
AGRICULTURE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

JOINT REPLY OF PETITIONERS

The central substantive issue presented in this petition for writ of certiorari is whether rules of the Secretary of Agriculture implementing

two congressionally authorized disaster programs for farmers are immunized from judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. by a remote statutory provision barring injunctive actions against the Commodity Credit Corporation, 15 U.S.C. § 714b(c). The Secretary's opposition contains several mischaracterizations of the case that merit brief reply.

1. The Secretary's opposition does not fairly characterize the roles of the Secretary of Agriculture and the Commodity Credit Corporation (CCC) with respect to the Emergency Feed Program (EFP), and the Livestock Feed Program (LFP).

a. Congress vested authority with the Secretary of Agriculture, not the

Commodity Credit Corporation, to "implement an emergency feed program," 7 U.S C. § 2267(a). Congress authorized the Secretary of Agriculture, not the CCC, "to issue regulations as the Secretary determines necessary to carry out the provisions" of the section creating the EFP. 7 U.S.C. § 2267(e).

b. Congress sought to insure that the Secretary of Agriculture, and no one else, was responsible for the EFP by prohibiting the delegation of authority to administer the EFP to any other department, agency, or entity, public or private. 7 U.S.C. § 2267(g). The Congress further directed that "The Secretary shall carry out the program authorized by this section through the Commodity Credit Corporation (emphasis supplied)." 7 U.S.C. § 2267(e).

c. With respect to the Livestock Feed Program, which involves the distribution of government-owned grain at advantageous prices to drought stricken farmers, Congress provided that, "the Corporation, on such terms and conditions as the Secretary may deem in the public interest, may make available to any farm commodity or product thereof owned or controlled by it (emphasis supplied) . . ." 7 U.S.C. § 1427. The Congress further authorized the Secretary, and not the CCC, to determine whether because of a natural disaster, "an emergency exists which warrants such assistance." 7 U.S.C. § 1427.

2. The Secretary's attempt to characterize the plaintiffs' action as an effort to obtain "an injunction

against the CCC," Opposition at 5, is inaccurate.

a. The Commodity Credit Corporation is not a party to this action.

b. The plaintiffs have no dispute with the Commodity Credit Corporation. The Corporation is simply "an administrative device established by Congress for the purpose of carrying out the federal farm program with public funds." Rainwater v. United States, 356 U.S. 590, 592 (1958). The Corporation, by statute, is subject to "the general supervision and direction of the Secretary of Agriculture." 15 U.S.C. § 714. The plaintiffs are confident that the Corporation will faithfully follow the directives of the Secretary of Agriculture with respect to the EFP and LFP.

c. If the Secretary directs by rule or adjudication that any of the farmer-plaintiffs should receive benefits, the CCC will no doubt provide them in an efficient manner in response to superior authority as required by law. The plaintiffs here attack not the enlisted quartermaster, who distributes supplies based on rules, but the authority which establishes the rules. See Mitchell v. Block, 551 F. Supp. 1011 (W.D. Va. 1982).

d. This type of action is precisely what the APA authorizes -- review of final agency action by the highest authority -- and is wholly outside the scope of the anti-injunction provision that protects the CCC's administration of government-owned property from inter-meddling litigants. See S. Rep. No.

1022, 79th Cong. 1st Sess. (1948) as cited in 1948 U.S. Code Cong. Service, 2138, 2148 (anti-injunction act designed to prevent "hindrance or impairment of Corporation operations" from creditors and other persons).

3. The Secretary's own cross petition in this case in No. 85-1818 undercuts his claim that the question of whether the anti-injunction act applies to efforts to challenge final agency action of the Secretary is not worthy of review by this Court.

a. The Secretary has filed a cross petition in this case seeking review of a holding by the Eighth Circuit with requiring the Secretary to promulgate rules creating a third disaster program, the Special Disaster Payments Program

(SDPP), 7 U.S.C. § 1444d(b)(2)(D). According to the Secretary, the provisions of the anti-injunction act in 15 U.S.C. § 714b(c) should have prevented the Court of Appeals from ordering the Secretary to promulgate rules for the SDPP.

b. The Secretary cannot have it both ways. If the question of applicability of the anti-injunction provision is worthy of review with respect to the SDPP, it is also worthy of review with respect to the LFP and the EFP.

c. If this Court believes that the Secretary's petition for certiorari must be granted, it should also grant review of the applicability of the anti-injunction statute to the EFP and the

LFP in order to insure uniformity of decision.

4. The assertion of the Secretary that this Court's review is "not warranted" because of the lack of a split in the Court of Appeals understates the importance of the sweeping Court of Appeals' opinion.

a. If unreviewed, the farmers in seven key Midwestern and Great Plains states in the Eighth Circuit will be unable to challenge policy decisions made by the Secretary of Agriculture involving a wide variety of critical government programs administered by the CCC.

b. The doors of the federal court house should not be slammed shut without review by this Court. For better or

worse, the federal government is extensively involved in American agriculture. As government policy has penetrated the agricultural economy, farm families have reasonably come to believe that their well being, or lack of it, is increasingly dependent upon government decisionmaking. A decision like that of the Court of Appeals in this case that broadly refuses to consider challenges to government decisionmaking by people who at least perceive that they have surrendered significant control of their lives to government planners threatens to undermine confidence in the courts and our system of government in rural areas of our nation. A powerful government bureaucracy that defies the will of elected representatives and cannot be haled into court is an image consistent

with a Franz Kafka novel, not twentieth century America.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164

TIMOTHY D. BENTON
Assistant Attorney General

G. F. HOFFMAN, III
Hoffman Law Firm
107 West Ninth Street
Leon, Iowa 50144

ATTORNEYS FOR PETITIONERS

*Counsel of Record